



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

# Proposal for a Compliance Officer for NSW Parliament



Report 83

May 2021

[www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au)

Privileges Committee

# **Proposal for a Compliance Officer for the NSW Parliament**

Ordered to be printed 11 May 2021

**New South Wales Parliamentary Library cataloguing-in-publication data:**

**New South Wales. Parliament. Legislative Council. Privileges Committee.**

Proposal for a compliance officer for NSW Parliament / Legislative Council, Privileges Committee. [Sydney, N.S.W.] : the Committee, 2021. – [112] pages ; 30 cm. (Report 83 / Privileges Committee)

Chair: The Peter Primrose MLC.

"May 2021"

ISBN 9781922543257

1. New South Wales. Parliament—Ethics.
2. Legislators—New South Wales.
3. Political ethics—New South Wales.
  - I. Title
  - II. Primrose, Peter.
  - III. Series: New South Wales. Parliament. Legislative Council. Privileges Committee. Report ; 83.

328.944 (DDC22)

## Table of contents

	<b>Terms of reference</b>	<b>v</b>
	<b>Committee details</b>	<b>ix</b>
	<b>Chair’s foreword</b>	<b>x</b>
	<b>Recommendations</b>	<b>xii</b>
<b>Chapter 1</b>	<b>From a Parliamentary Commissioner for Standards to a Compliance Officer</b>	<b>1</b>
	The ICAC recommendation in 2013	1
	The Privileges Committee inquiry 2014	1
	Presiding Officers’ correspondence to the Premier	2
	The 2020 proposed resolution	2
	This Report	3
<b>Chapter 2</b>	<b>Bullying and Harassment</b>	<b>5</b>
	Crimes are not investigated by the Compliance Officer	5
	Why does the proposed resolution include bullying and harassment?	6
	What has changed since 2014 to require this significant addition to the role of the officer?	6
	Do other jurisdictions give a compliance officer responsibility for bullying and harassment?	10
	Is the proposed amendment to the Code sufficient to cover instances of bullying and harassment?	13
	Is a different skill set required for a Compliance Officer responsible for receiving complaints on bullying and harassment?	15
	Does the proposed resolution allow the Compliance Officer to investigate allegations of bullying and harassment by member’s staff and ministerial staff?	18
	Does the proposed resolution cover bullying and harassment of student interns and volunteers?	19
	Does the proposed resolution allow one member to complain they have been bullied by another member?	19
	Will the Compliance Officer be able to provide advice to members on staff related issues?	20
	Will the Compliance Officer investigate complaints about matters received prior to the position being established?	20
<b>Chapter 3</b>	<b>Appointment, Functions and Powers</b>	<b>21</b>
	How is the Compliance officer appointed?	21
	How can the Compliance Officer be dismissed?	22
	Are the investigatory functions allocated to the Compliance Officer sufficient?	24
	Are the monitoring functions assigned to the Compliance Officer likely to be effective?	25
	Is the advisory function of the compliance office sufficiently described?	27
	Could the non-complaint functions of the Compliance Officer be made clearer?	28
	Are the powers proposed for the Compliance Officer sufficient for the investigation role?	29

	Do the powers to investigate extend to Ministers and Ministerial staff?	31
<b>Chapter 4</b>	<b>Investigations and Referral Protocols</b>	<b>33</b>
	How will complaints be received and investigated?	33
	How will the position interact with existing HR functions within the parliamentary administration?	35
	How will duplication with other agency investigations be avoided?	35
	ICAC and the Impact of Operation Keppel	41
	Will all aspects of investigations be confidential?	42
	How will the Compliance Officer deal with vexatious complaints?	42
	Will the Compliance Officer be able to investigate a complaint by a member of one House against another?	43
<b>Chapter 5</b>	<b>Reporting and oversight</b>	<b>45</b>
	How will the Officer report on outcomes of an investigation?	45
	Can the records of the investigation be subpoenaed?	51
	In what circumstances will the records of the Compliance Office be made public?	51
	What oversight will there be over the work of the Compliance Officer?	54
<b>Chapter 6</b>	<b>A revised resolution for the Compliance Officer</b>	<b>55</b>
<b>Appendix 1</b>	<b>Submissions</b>	<b>61</b>
<b>Appendix 2</b>	<b>Chapter 4 of the Privileges Committee 2014 report</b>	<b>62</b>
<b>Appendix 3</b>	<b>Guiding Principles: A reporting process for NSW Parliament MoPS staff (extract from PSA's supplementary submission)</b>	<b>87</b>
<b>Appendix 4</b>	<b>Minutes</b>	<b>88</b>

## Terms of reference

- (1) The Privileges Committee review the following proposed resolution for the establishment of a Parliamentary Compliance Officer, as brought forward by the President, in the same terms as the proposal brought forward by the Speaker in the Legislative Assembly:

### **Proposed resolution to establish a position of Compliance Officer**

#### **(1) Establishment of position**

That this House directs the President to join with the Speaker to make arrangements for the establishment of the position of Compliance Officer, to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all members and staff.

#### **(2) Functions of position**

The Compliance Officer shall have the following functions:

- (a) Receive and investigate complaints

The Compliance Officer may receive and investigate complaints confidentially in relation to alleged breaches of the members' code of conduct, not related to conduct in proceedings of the Legislative Council or Legislative Assembly or their committees, including:

- (i) misuse of allowances and entitlements,
- (ii) other less serious misconduct matters falling short of corrupt conduct,
- (iii) allegations of bullying, harassment and other types of grievances,
- (iv) minor breaches of the pecuniary interests disclosure scheme.

- (b) Monitoring Code of Conduct for Members

The Compliance Officer shall monitor the operation of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 and the members' entitlements system, and provide advice about reform to the Privileges Committee as required.

- (c) Educational presentations

The Compliance Officer shall assist the Privileges Committee, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the Constitution (Disclosures by Members) Regulation 1983.

- (d) Informal advisory services

A member or the parliamentary administration may seek confidential advice on a matter of interpretation of the Members' Entitlements scheme, for the purposes of resolving any disagreements.

**(3) Amendment of the Code of Conduct for Members**

The Members' Code of Conduct is amended by the addition of the following paragraph:

*"Clause 10*

Members must treat their staff and each other and all those working for Parliament in a manner compatible with a safe workplace, free from harassment.

*Commentary*

*Section 22(b) of the Anti-Discrimination Act 1977 makes it an offence for a member to sexually harass a workplace participant or another member in the workplace, or for a workplace participant to sexually harass a member."*

**(4) Term of appointment****(a) Appointment by Presiding Officers**

The Presiding Officers shall appoint a Compliance Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of that Parliament and until the mid-term point of the following Parliament. The proposed appointment must have the support of the Privileges Committee in each House. An appointment may be extended for a period of up to six months so as to ensure there is no period in which there is no person holding the position.

**(b) Dismissal**

The Compliance Officer may only be dismissed by the Chief Executive Officer of the Department of Parliamentary Services with the consent of the President and Speaker.

**(5) Complaints investigations****(a) Protocol**

The Compliance Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Privileges Committee and tabled in the House by the President, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Compliance Officer and the Independent Commission Against Corruption and other relevant bodies, subject to relevant legislation (including section 122 of the Independent Commission Against Corruption Act).

**(b) Investigatory report to the House**

Where the Compliance Officer considers that there has been a misuse of an allowance or entitlement, the Compliance Officer may order repayment of funds misused. Where the Compliance Officer considers that a member has otherwise breached the Members' Code of Conduct, the Compliance Officer may recommend corrective action.

Subject to (c) below, the Compliance Officer will make a report to the House if, and only if, the member does not comply with the order or accept the recommendation as the case may be, and the complainant consents to the making of a report.

(c) Minor breach

Where the Compliance Officer investigates a matter and finds that a member has breached the Code or Regulations, but in his or her opinion considers the breach to have been minor or inadvertent and the member concerned has taken such action to rectify the breach, including the making of appropriate financial reimbursement, the Compliance Officer shall advise in writing the member and the complainant of the finding and the action taken by the member. No report to a House is required in this circumstance.

(d) Declines to investigate

If the Compliance Officer receives a complaint but upon assessment declines to investigate the matter, or upon investigation finds no evidence or insufficient evidence to substantiate a breach of the Code of Conduct for Members or the Constitution (Disclosure by Members) Regulation, the Compliance Officer shall advise in writing the member and the complainant of the decision. No report to a House is required in this circumstance.

(e) Expert assistance

The Compliance Officer may engage the services of persons to assist with or perform services for the Compliance Officer, including in the conduct of an investigation, within budget.

**(6) Powers of the Compliance Officer**

The Compliance Officer shall have power to call for the production of relevant documents and other records from members and officers of the Parliament.

Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the Compliance Officer's inquiries including giving a full, truthful and prompt account of the matters giving rise to a complaint.

The Compliance Officer may report any failure to comply with these provisions to the President, for determination of the matter by the House.

**(7) Keeping of record**

The Compliance Officer shall be required to keep records of advice given and the factual information upon which it is based, complaints received and investigations. The records of the Compliance Officer are to be regarded as records of the House and are not to be made public without the prior approval of the Compliance Officer and resolution of the House, except for the referral of information between the Compliance Officer and other relevant authorities in accordance with paragraph 12 of the protocol or where the member requests that the records be made public.

**(8) Reports to Parliament**

In addition to reports on investigations, the Compliance Officer shall be required to report to the Parliament annually on the performance of his or her functions including the number of members who sought advice, the number and types of complaints received and the number of investigations undertaken and the findings of those investigations. All reports from the Compliance Officer are to be tabled by the President on the next sitting day after receipt.

**(9) Annual meeting with relevant committees**

The Compliance Officer is to meet annually with the Privileges Committee of the House.

The terms of reference were referred to the committee by the Legislative Council on Tuesday 17 November 2020.<sup>1</sup>

---

<sup>1</sup> *Minutes*, NSW Legislative Council, 17 November 2020, pp 1650-1653.

## Committee details

### Committee members\*

<b>The Hon Peter Primrose MLC</b>	Australian Labor Party	<i>Chair</i>
<b>Revd the Hon Fred Nile MLC</b>	Christian Democratic Party	<i>Deputy Chair</i>
<b>The Hon Greg Donnelly MLC</b>	Australian Labor Party	
<b>Ms Cate Faehrmann MLC</b>	The Greens	
<b>The Hon Trevor Khan MLC</b>	The Nationals	
<b>The Hon Natasha Maclaren-Jones MLC</b>	Liberal Party	
<b>The Hon Natalie Ward MLC</b>	Liberal Party	

### Contact details

<b>Website</b>	<a href="http://www.parliament.nsw.gov.au">www.parliament.nsw.gov.au</a>
<b>Email</b>	<a href="mailto:privilege@parliament.nsw.gov.au">privilege@parliament.nsw.gov.au</a>
<b>Telephone</b>	(02) 9230 2976

\* The Honourable Matthew Mason-Cox MLC was a member of the committee for the inquiry prior to his election as President on Tuesday 4 May 2021 (Wednesday 24 March 2021 sitting day).

## Chair's foreword

This inquiry is the second time the Privileges Committee has examined a proposal for an independent officer charged with investigating complaints against members. In 2014 the Committee examined a recommendation from the Independent Commission Against Corruption for an officer to investigate alleged breaches of the Member's Code of Conduct falling short of the systemic corruption dealt with by the Commission. The Committee saw value in adopting the UK Parliament's model of a Standards Commissioner, to handle investigations quickly and confidentially for matters such as misuse of entitlements and conflicts of interest, with action needing to be taken only when a member fails to comply with rectification or other measures. Unfortunately failure to reach agreement with the Legislative Assembly on a consistent model meant the proposal did not progress.

The proposal gained renewed impetus in 2020, when the Presiding Officers, and then the government leaders in both Houses, prepared a draft resolution for what has been renamed as a Compliance Officer. In November of that year both Houses referred the draft resolution to their respective Privileges Committees, which has led to this report.

The major development since 2014 is the focus on receiving and investigating complaints regarding bullying and harassment – there is currently no mechanism for dealing with complaints against members of the NSW Parliament in this area except when the claims amount to sexual harassment. The Committee supports the amending of the Members Code of Conduct to include bullying and harassment, but suggests a change in wording from that proposed. In the time that this inquiry has been underway the significance of this new role for the position has taken on added weight because of the emergence of various scandals in Federal Parliament in early 2021.

The draft resolution anticipates that the Compliance Officer may appoint an expert with specialist skills to investigate complaints of bullying and harassment. However the Committee believes this needs to go further and consider the UK model where a dedicated officer, reporting to the Compliance Officer, is able to receive complaints in the first instance. Sensitive handling of an approach by a junior staffer who believes they are being harassed, for instance, requires a different skill set from dealing with a complaint that a member is claiming inappropriate travel expenses. It may be that one individual can encompass both roles, but the committee wants there to be an option for the Compliance Officer to engage a specialist if this is required.

In its inquiry the committee has been greatly assisted by detailed and considered submissions from the Clerk of the Parliaments, the Parliamentary Ethics Adviser, the Chief Commissioner of the ICAC, the NSW Auditor General and the Acting Ombudsman, the Public Service Association and from the St James Ethics Centre and the UK House of Commons. Their analysis has contributed to the recommendations in this report, which do make suggested changes to the draft Compliance Officer resolution while retaining the main framework. One of the more significant recommendations is for the Compliance Officer to report to the Privileges Committee rather than directly to the House when action is needed.

In reviewing the evidence, it is also apparent to the Committee the high importance of the investigation protocol that the Compliance Officer will need to develop within three months of being appointed. The way in which liaison between the Compliance Officer and the ICAC, the Audit Office and the Ombudsman takes place, as well as between the human resources and audit functions in the parliamentary administration, will be crucial to an effective complaints handling, assessment and referrals. The protocol

will also need to address the risks of complaints being “weaponised” for political purposes, although the Committee notes several safeguards in the current resolution such as the ability of a member to request that a finding be made public.

The Committee is reporting back to the Legislative Council but is very interested in its counterpart committee in the Legislative Assembly engaging with these recommendations, with a view to coming to an agreed and consistent position between the Houses. It is in the interests of all members of the NSW Parliament to have a quick, effective and confidential way of dealing with breaches of the Code of Conduct, without simple complaints becoming entangled in the much longer and more complex processes of the ICAC.

The Honourable Peter Primrose  
**Chair**

## Recommendations

- Recommendation 1** **15**  
That the amendment to the Members' Code of Conduct contained in clause 3 of the proposed resolution be in the following words:  
“A Member must treat their staff and each other and all those working for Parliament in the course of their parliamentary duties and activities with dignity, courtesy and respect, and free from any behaviour that amounts to bullying, harassment or sexual harassment.”
- Recommendation 2** **17**  
That:  
(a) an expert with appropriate skills and experience in dealing with bullying and harassment be available to the Compliance Officer to receive, as well as investigate, complaints, and clause 5 (e) be modified accordingly, and  
(b) where a complaint is made directly to this expert the Compliance Officer be notified.
- Recommendation 3** **23**  
That clause 4 (b) be omitted from the proposed resolution and the terms of dismissal be instead included in the contract of employment offered by the Presiding Officers, expressed in similar terms to that of the contract of employment for the Parliamentary Ethics Adviser.
- Recommendation 4** **27**  
That the Compliance Officer, once appointed, liaise with the Audit Office and Parliament's internal audit provider to establish a co-operative working relationship in regard to the monitoring of entitlements.
- Recommendation 5** **28**  
That the words “or any other matter within the complaints handling functions of the position” be added to the end of clause 2(d), to enable the officer to provide advice on issues of bullying and harassment.
- Recommendation 6** **31**  
That clause 3 of the proposed resolution be amended to require the second paragraph of clause 9 of the Member's Code of Conduct to refer to the Compliance Officer, as follows:  
“Breaches of this Code may result in actions being taken by the House in relation to the Member. A substantial breach of this Code may constitute corrupt conduct for the purposes of the Independent Commission Against Corruption Act 1988. A minor breach of this Code may be the subject of an investigation by the Compliance Officer”.
- Recommendation 7** **35**  
That the referral protocol to be developed by the Compliance Officer include guidance as to:  
(a) how to receive complaints or potential complaints originally referred from the human resources function of the parliamentary administration,  
(b) in what circumstances it is appropriate to refer a potential complainant to human resources if they do not wish to proceed with their complaint but require other support, and

- (c) in what circumstances human resources may be able to assist members with advice on staff matters.

- Recommendation 8** **37**  
That as part of the development of an investigation protocol the Compliance Officer prepare a draft Memorandum of Understanding with the ICAC, including a notification process.
- Recommendation 9** **41**  
That:
- (a) the Compliance Officer be nominated as a ‘disclosure officer’ under the Parliament’s public interest disclosure policies,
  - (b) processes be developed to ensure that the Compliance Officer properly assesses complaints to determine whether they are also public interest disclosures, and
  - (c) arrangements be put in place to ensure that, in cases where a complaint is or might be a public interest disclosure, it is dealt with in compliance with the *Public Interest Disclosures Act 1994* and expected standards of practice including the Parliament’s public interest disclosure policies.
- Recommendation 10** **41**  
That the words “including the most appropriate body in relation to bullying and harassment matters” be added after the words “other relevant bodies” in clause 5(a) to ensure the protocol to be developed includes consideration of referral to agencies able to address bullying and harassment.
- Recommendation 11** **43**  
That the protocol to be developed by the Compliance Officer consider the most appropriate way to deal with vexatious complaints and how to prevent the potential for abuse of the complaints process for political purposes.
- Recommendation 12** **44**  
That the Privileges Committees in both Houses attempt to expeditiously find agreement on a form of the resolution acceptable to the members they represent, and only as a last resort should the Legislative Council establish a Compliance Officer solely under its own procedures.
- Recommendation 13** **51**  
That clause 5(b) and clause 6 of the proposed resolution be amended to require:
- (a) the Compliance Officer report to the Privileges Committee in relation to breaches of the Code and disclosure requirements when the matter is not capable of rectification
  - (b) that on bullying and harassment issues, an independent investigator reports to the Compliance Officer, who then reports to the Privileges Committee when the matter is not capable of rectification.
  - (c) that the Privileges Committee then recommend to the House any actions required by the member or the House.
- Recommendation 14** **53**  
That the following words be added to the end of clause 7:  
“A member requesting the records be made public should present the records to the Clerk, to be tabled in the House at the next sitting.”

**Recommendation 15**

54

That in circumstances where a more expeditious publication is required due to a long break between sittings, the Privileges Committee be empowered to publish such records following a recommendation from the Compliance Officer.

**Recommendation 16**

54

That the words “with paragraph 12 of the protocol” be omitted from Clause 7 of the proposed resolution and the words “the protocol to be developed in accordance with clause 5 (a)” be inserted instead.

**Recommendation 17**

55

That the House consider adopting the following revised resolution to establish a Compliance Officer:

The Compliance Officer is to meet annually with the Privileges Committee of the House.

# Chapter 1 From a Parliamentary Commissioner for Standards to a Compliance Officer

This chapter discusses the origins of the proposed resolution for a Compliance Officer.

## The ICAC recommendation in 2013

- 1.1 The United Kingdom first appointed a Parliamentary Commissioner for Standards in 1995, and most Canadian jurisdictions have had similar positions for many years. However the most recent<sup>2</sup> impetus for such a position in the NSW Parliament began with a recommendation by the Independent Commission Against Corruption (ICAC) in its 2013 report *Reducing the opportunities and incentives for corruption in the State's management of coal resources*. The report noted:

The effectiveness of codes of conduct and statutory pecuniary interest regimes is dependent on timely and impartial enforcement mechanisms. No such enforcement mechanisms exist in NSW outside of that provided by the Commission's jurisdiction. This is problematic for allegations of minor breaches given the role of the Commission, as far as practicable, to direct its attention to serious and systemic corrupt conduct. Furthermore, the provisions of s9 of the ICAC Act require a "substantial" breach of an applicable code of conduct.<sup>3</sup>

- 1.2 The ICAC noted that the current integrity system was based upon an "all or nothing" response – breaches of the Code of Conduct either became the subject of a corruption investigation, or were treated as "minor" and ignored, to the detriment of public confidence in the institution of parliament.<sup>4</sup>
- 1.3 Recommendation 25 of that report urged the Legislative Council Privileges Committee to consider the establishment of a "parliamentary investigator", in consultation with the Legislative Assembly Privileges and Ethics Committee.<sup>5</sup>

## The Privileges Committee inquiry 2014

- 1.4 In 2014 the Legislative Council and Legislative Assembly Privileges Committees tabled reports dealing with a range of matters relating to the conduct of members.<sup>6</sup> The reports included recommendations for the appointment of a Commissioner for Standards (LC) or Ethics Commissioner (LA), as well as a number of matters relating to the Code of Conduct and

<sup>2</sup> Noting the model was first considered in 1996, without any firm view being taken – Legislative Council Standing Committee on Parliamentary Privilege and Ethics Report No. 3, *Report on Inquiry into the establishment of a Draft Code of conduct for Members*, October 1996, pp 77-89.

<sup>3</sup> NSW ICAC, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013, p 43.

<sup>4</sup> Ibid p44.

<sup>5</sup> Ibid.

<sup>6</sup> Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosures regime and a parliamentary investigator*. Report 70, June 2014, Standing Committee on Parliamentary privilege and ethics, *Inquiry into matters arising from the ICAC report entitled "Reducing the opportunities and incentives for corruption in the State's management of coal resources"* Report 2/55, July 2014.

pecuniary interest disclosure regimes. A key role of the Commissioner for Standards in the LC Privileges Committee model was the investigation of complaints about breaches of the Code of Conduct which do not amount to substantial breaches. Substantial breaches would remain the responsibility of the ICAC, so that the current role of the ICAC in relation to Members would not change. Appendix 2 contains Chapter 4 of the Privileges Committee 2014 report which includes a detailed analysis of the origins of the proposed position and its counterparts in other jurisdictions.

### **Presiding Officers' correspondence to the Premier**

- 1.5 At the time of tabling of the two committee reports the media reported that then Premier the Hon Mike Baird was supportive of the proposal, but with two different models and a perceived lack of sufficient support from members of both Houses no action was taken prior to the 2015 election.<sup>7</sup>
- 1.6 The proposal was revived on 1 June 2016 when the then Premier the Hon Mike Baird wrote to the then Presiding Officers President the Hon Don Harwin and Speaker the Hon Shelley Hancock. Mr Baird advised that the Government agreed in principle with the recommendations of the respective committees but noted some differences in those recommendations and requested that an agreed position be prepared.
- 1.7 The Presiding Officers responded on 21 June 2016, advising that they would be pleased to assist in relation to this matter, as well as identifying a number of related matters that should be progressed to further enhance the integrity, transparency and operations of the Parliament. The Premier's letter and Presiding Officers' response were tabled in both Houses on 22 June 2016.<sup>8</sup>
- 1.8 The Presiding Officers and senior officers of the parliamentary departments worked on developing a package of responses but there was difficulty in reaching an agreed position between the two Houses, and little progress was made after 2017.

### **The 2020 proposed resolution**

- 1.9 Finally the pressure for renewed interest in the position came in 2020 when an incident prompted a recognition by members from several parties that there were no current mechanisms to address allegations of bullying behaviour by members. In his submission to this inquiry the Clerk of the Parliaments described the origins of the current proposal:

Nevertheless various members and officers continued to be troubled by the "jurisdictional gap" and absence of a body authorised to expeditiously resolve minor misconduct matters. In August 2020, the Clerk of the Legislative Assembly and I received correspondence from 23 Members across both Houses requesting the development of a mechanism or process to handle complaints about the conduct of Members, including alleged bullying or inappropriate behaviour.<sup>9</sup>

---

<sup>7</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 2.

<sup>8</sup> *Minutes*, NSW Legislative Council 22 June 2016, p966, *Votes and Proceedings*, NSW Legislative Assembly 22 June 2016, p 745.

<sup>9</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 2.

**1.10** The Presiding Officers subsequently requested both Clerks and the Chief Executive of the Department of Parliamentary Services to prepare a jointly agreed proposal to establish a position of “compliance officer”. Drawing upon the 2016/17 research, the three Department heads provided a joint submission to the Presiding Officers on 27 August 2020, attaching a draft resolution for the establishment by both Houses of the position and a draft protocol for the investigation of complaints by the Compliance Officer. The draft resolution prepared by the three department heads included a proposed amendment to the Code of Conduct to include:

A requirement to treat “staff, each other and all those visiting or working for or with Parliament with dignity, courtesy and respect” thereby bringing bullying and harassment within the framework of the Code of Conduct and the jurisdiction of the Compliance officer.<sup>10</sup>

**1.11** The joint proposal was submitted by the Presiding Officers to the Leaders of the Houses in each House in October. The Leaders made amendments to the resolution and took these to their respective Houses. The draft resolution was referred to the Privileges Committee on 17 November 2020. The Legislative Assembly has likewise referred the draft resolution to its Privileges Committee.<sup>11</sup>

### **This Report**

**1.12** Chapter Two of this report looks in detail at the new aspect of this proposal, which involves amending the Code of Conduct to enable the Compliance Officer to investigate complaints of bullying and harassment received against members.

**1.13** Chapter Three examines the way the Compliance Officer is appointed and dismissed, the officer's functions, and the powers provided to carry out those functions.

**1.14** Chapter Four looks at the key issue of a protocol for investigations, particularly how referrals will be made to the ICAC and other agencies.

**1.15** Chapter Five reviews the reporting requirements of the proposed Compliance Officer and the role of the Privileges Committee overseeing the role.

**1.16** Chapter Six recommends a revised draft of the proposed resolution for consideration by the Legislative Council, with a recommendation that the Privileges Committee be authorised to negotiate with the Legislative Assembly Parliamentary Privilege and Ethics Committee to reach a consistent outcome between both Houses.

**1.17** The Committee received a number of thoughtful and perceptive submissions from key stakeholders, and has based its analysis on those responses received. Every submission supports the proposal, while differing on detail.

<sup>10</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments p 3.

<sup>11</sup> Legislative Assembly *Votes and Proceedings* 12/11/2020 pp 931 – 934. (see also Legislative Council *Minutes of Proceedings* 17/11/2020 pp 1650- 1656.



## Chapter 2 Bullying and Harassment

This chapter reviews those parts of the proposed resolution which address bullying and harassment issues, including a proposed amendment to the Members' Code of Conduct.

### Crimes are not investigated by the Compliance Officer

- 2.1** If a crime has allegedly been committed by any person – whether or not it has occurred in the parliamentary precinct and whether or not it involves Members, staff or visitors – it should be referred to the appropriate independent, external investigative agencies. This almost certainly includes the NSW Police, and may additionally include the Independent Commission Against Corruption (ICAC) or other bodies.
- 2.2** Members of Parliament, members' staff and parliamentary staff are subject to the same criminal laws as any other citizens. Protocols exist for the execution of search warrants on the premises, but the parliamentary precincts are not a sanctuary. Criminal behaviour should not be treated differently if it occurs on parliamentary premises to when it occurs in other locations.
- 2.3** In considering the proposed Compliance Officer position's role in bullying and harassment it is very important to understand that once the alleged complaint passes the threshold where there is a possibility of a crime – such as sexual assault or physical assault – it is beyond the role of this officer. It is possible that an initial harassment or bullying investigation begun by the Compliance Officer may uncover serious incidents, but if so they will be referred to the appropriate agencies in line with a strict and publicly available protocol that will be developed for the position.
- 2.4** The Committee notes the resolution passed by the Legislative Council on Wednesday 17 March 2021<sup>12</sup>, which considers approaches to sexual assault and sexual harassment to address prevention in the parliamentary workplace. The final paragraphs of the resolution state:
- (4) That this House calls on the Government and the Presiding Officers of both Houses to take proactive measures to ensure that Parliament is a safe workplace for all women, and is free of assault and harassment, including by:
    - (a) implementing a confidential reporting mechanism,
    - (b) regularly confidentially surveying all staff working in or for Parliament & its Members on their experiences in the workplace, in line with the People Matter Employee Survey conducted by the Public Service Commission
    - (c) contracting an external organisation to conduct a review of all relevant workplace policies with the view to implementing best practice evidence-based work health and safety policies, processes and procedures,
    - (d) providing sexual consent training to all staff working in or for Parliament & its Members, and

<sup>12</sup> *Minutes*, NSW Legislative Council, 17 March 2021, pp 2023-2026.

(e) providing widespread best-practice training on responding to disclosures of sexual harassment and assault.

(5) That the Presiding Officers of each House develop an independent investigative mechanism, in consultation with members and all staff who work in Parliament and relevant unions.

**2.5** The scope of the resolution goes beyond the matters considered in this report, but the existence of an effective and independent complaints mechanism can do much to prevent more serious problems developing. The Compliance Officer is intended to provide an independent investigative mechanism, and to be a place for confidential reporting.

### **Why does the proposed resolution include bullying and harassment?**

**2.6** The 2014 model of a Standards Commissioner recommended by the Privileges Committee did not consider whether this position would have a role in addressing bullying and harassment. However the proposed resolution tabled in both Houses makes this a requirement at cl (2) (a) (iii), that is the officer may receive and investigate complaints in relation to “allegations of bullying, harassment and other types of grievances.”

**2.7** As the “compliance” with which the officer is charged is compliance with the Members’ Code of Conduct, to ensure the position has the power to investigate complaints requires an amendment to the current Code of Conduct, as set out in cl 3:

The Members Code of Conduct is amended by the addition of the following paragraphs:

#### *Clause 10*

Members must treat their staff and each other and all those working for Parliament in a manner compatible with a safe workplace, free from harassment.

#### *Commentary*

*Section 22 (b) of the Anti-Discrimination Act 1977 makes it an offence for a member to sexually harass a workplace participant or another member in the workplace or for a workplace participant to sexually harass a member.*

### **What has changed since 2014 to require this significant addition to the role of the officer?**

**2.8** The Clerk of the Parliaments in his submission notes firstly that the impetus for renewed action on this proposal came from a request by 23 members from different parties for a mechanism to independently investigate complaints about bullying or inappropriate behaviour.<sup>13</sup> However he also noted that since 2014 there has been widespread concern around the world in Westminster jurisdictions about the inability of parliaments to deal with bullying and harassment, whether by members or by others in the parliamentary workplace. Among the prominent reports into these allegations in the last two years are:

---

<sup>13</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments p 4.

- Creating the Right Culture (in the Welsh Assembly), Report by the Standards of Conduct Committee, September 2018,<sup>14</sup>
- The Bullying and Harassment of House of Commons (UK) staff, Independent inquiry report, 15 October 2018 (the Cox report),<sup>15</sup>
- Report of the Joint Working Group on Sexual Harassment (in the Scottish Parliament), December 2018,<sup>16</sup>
- Bullying and Harassment in the New Zealand Parliamentary Workplace: External Independent Review, May 2019 (the Francis report),<sup>17</sup>
- A 2020 survey of House of Representatives staff which reported experiences of bullying and harassment of parliamentary staff,<sup>18</sup> and
- Review of policies and procedures for Ministerial offices – bullying, harassment, and sexual misconduct, by the Hon Pru Goward, 19 April 2020.<sup>19</sup>

**2.9** The most recent report from New Zealand observes that “bullying and harassment are systemic in the parliamentary environment,” with risk factors that include “a high intensity culture” and “unusual and complex employment arrangements.”<sup>20</sup> The report further states that “a core perceived problem is low accountability, particularly for Members, who face few sanctions for harmful behaviours.”<sup>21</sup> All of the aforementioned reports refer to the power imbalances inherent in the parliamentary environment as a major risk factor. These risk factors are very much present in the NSW Parliament, as they are in most parliaments.

**2.10** This is acknowledged in the supplementary submission by the Public Service Association:

As known by Members’ staff working in parliaments around Australia, and perhaps around the world, the asymmetrical power structures that are present in our workplaces can dramatically increase the risk of harmful interpersonal conduct, while at the same time heightening the barriers for reporting, investigation and due process regarding that conduct.

A parliament is, in many ways, an abnormal workplace, and any processes that seek to resolve the myriad workplace issues that are present require a carefully considered, widely consulted and nuanced approach to be successful.<sup>22</sup>

<sup>14</sup> National Assembly for Wales, Standards of Conduct Committee.

<sup>15</sup> Report by Dame Laura Cox DBE, appointed by the House of Commons Commission

<sup>16</sup> Appointed by the Scottish Parliamentary Corporate Body.

<sup>17</sup> Debbie Francis, sponsored by the Speaker of the House of Representatives, NZ.

<sup>18</sup> Sydney Morning Herald “Suck it up – Parliament staff claim harassment complaints ignored, website accessed 17 February 2021.(The Clerk did not refer to this in his submission as this was reported on 5 March 2021.

<sup>19</sup> This report was released after the committee had first met and agreed on a draft report; the committee has not had sufficient time to consider any relevant aspects of this report.

<sup>20</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 5.

<sup>21</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 5.

<sup>22</sup> Submission 4a, Ms Peta Waller-Byrant, PSA Delegate, Public Service Association of NSW, p 1.

- 2.11** In his submission to the Committee the Clerk of the Parliaments explained how the experience documented in the overseas reports referred to above influenced his approach to induction of new members after the 2019 election:

As Clerk I found the (UK House of Commons) Cox report both troubling and thought provoking, particularly its observations critical of the management of these issues by senior parliamentary officers. The Cox report specifically identifies the “deferential culture” towards Members, the “acquiescence of senior management” and the “institutional minimising of complaints” as factors that have created the environment in which bullying and harassment have flourished. After careful reflection I resolved to explicitly address bullying and harassment during the 2019 induction program for newly elected Members of the Legislative Council in April 2019 and at the seminar on the new Code of Conduct for Members later that year.<sup>23</sup>

- 2.12** In delivering this message, however, for the Clerk it only bought home the gaps in the current system which has no formal mechanism to deal with bullying and harassment:

Whilst I stand by the statements I made on those occasions, what was glaringly obvious to me in making them was that the absence of an established mechanism which gives someone the authority to investigate complaints about bullying and harassment means there is a real risk that such statements, and appeals to “the better angels” of Members, could easily ring hollow.<sup>24</sup>

- 2.13** Parliament has detailed policies on Anti-Bullying and a Harassment Free Workplace but these only apply to parliamentary staff and members’ staff, not to members. There is no mention of bullying and harassment in the current Members’ Code of Conduct. As raised by the Public Service Association of NSW (PSA), for all employers there are obligations under the *Work Health and Safety Act 2011*.<sup>25</sup> However the Presiding Officers have WHS responsibility for members’ staff under s25 of the *Members of Parliament Staff Act 2013* despite the Act effectively making the member the employer in all other respects.

- 2.14** The only aspect of harassment and bullying arising from actions of a member that have any consequence is sexual harassment in the workplace, due to provisions inserted in 1997 into the *Anti-Discrimination Act 1977*. Section 22A defines “sexual harassment”:

For the purposes of this Part, a person sexually harasses another person if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or
- (b) the person engages in other unwelcome conduct of a sexual nature in relation to the other person,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

---

<sup>23</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 5.

<sup>24</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 5.

<sup>25</sup> Submission 4, Mr Stewart Little, General Secretary, Public Service Association of NSW, p 4.

**2.15** This then is applied in s22B (7):

- (7) It is unlawful for a member of either House of Parliament to sexually harass:
- (a) a workplace participant at a place that is a workplace of both the member and the workplace participant, or
  - (b) another member of Parliament at a place that is a workplace of both members.

**2.16** If a complaint of sexual harassment is made to the Anti-Discrimination Board, the Board will seek to conciliate the matter. If conciliation is not possible and the complaint is upheld by the relevant Tribunal a Member may be personally liable for the payment of up to \$110,000 in damages.

**2.17** Bullying and harassment are much wider in scope than sexual harassment. To illustrate, the Clerk<sup>26</sup> listed the following forms of bullying behaviour experienced by staff in the Westminster parliament as reported in the Dame Laura Cox report:

- frequently targeting a member of staff with personal abuse;
- constantly criticising or making derogatory remarks about their work;
- shouting or speaking aggressively at staff, and often junior members of staff, for not doing something they wanted, or not doing it sufficiently quickly;
- telling them they are useless and humiliating them in front of others;
- taunting, mocking or mimicking them;
- deliberately belittling them in front of other Members;
- making offensive personal comments about their appearance or perceived characteristics, or questioning them repeatedly about their personal life;
- using offensive or discriminatory language about other staff or MPs;
- challenging the staff member's authority if asked to follow a particular procedure or rule;
- belittling someone's junior status;
- obstructing staff from properly carrying out their job;
- imposing wholly unrealistic and inefficient work demands or deadlines;
- questioning their annual leave entitlements or telling staff to remove themselves from contractual rotas/responsibilities or from scheduled training courses;
- suddenly holding unscheduled meetings or making new demands at a time when they knew that staff had to leave because of childcare commitments, and in a way that was described as "poisonous, vindictive and deliberate;" or

<sup>26</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, Appendix 1, p 12. Extract from his induction speech to new members after the 2019 election.

- repeatedly subjecting them to lengthy and humiliating tirades of criticism and abuse in front of colleagues.<sup>27</sup>

**2.18** If a complaint is currently received concerning any of these behaviours directed at staff by a member, the Presiding Officers and parliamentary administration have no authority to investigate the matter unless the member chooses to assist. As indicated by the PSA in their submission, this is in the context of a framework where under the *Members of Parliament Staff Act 2013* a member is able to terminate their staff member at any time without providing reasons and without recourse to the provisions of the *Industrial Relations Act 1996*:

These provisions allows the staff member to be bullied, harassed and victimised with reduced provisions to support resolution of the matter. The likelihood of these workers complaining will be diminished as they will be rightfully fearful of retaining their job.

It is with this in mind that the PSA hopes the creation of the new Compliance Officer role will go some way to improving the situation for these staff in terms of their concerns being addressed.<sup>28</sup>

**2.19** It is significant that every submission which mentions the issue supports amending the Code to include bullying and harassment, including the submission from the ICAC.<sup>29</sup>

### **Do other jurisdictions give a compliance officer responsibility for bullying and harassment?**

#### *United Kingdom*

**2.20** The UK Parliament's Independent Complaints and Grievance Scheme (ICGS) which applies to all persons at Parliament includes a Behaviour Code, Sexual Misconduct, Bullying and Harassment policies and a confidential helpline.<sup>30</sup> Members are required to observe the Behaviour Code under the Code of Conduct adopted by each House.<sup>31</sup> Breaches of the Code are investigated by a commissioner in each the House but there are differences between the procedures that are followed in each House.

**2.21** In the House of Commons an independent investigator provided through the ICGS investigates complaints in the first instance.<sup>32</sup> The investigator is overseen by and reports to the

<sup>27</sup> Report by Dame Laura Cox DBE, appointed by the House of Commons Commission, *The Bullying and Harassment of House of Commons (UK) staff* 2018, p 63-64.

<sup>28</sup> Submission 4, Mr Stewart Little, General Secretary, Public Service Association of NSW, p 2.

<sup>29</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the ICAC, para 3.1.

<sup>30</sup> UK Parliament, *Using the Independent Complaints and Grievance Scheme (ICGS): guide for complainants*, pp 2-3, <https://www.parliament.uk/globalassets/documents/conduct-in-parliament/complainant-user-guide.pdf>.

<sup>31</sup> UK House of Commons, *The Code of Conduct together with the Guide to the rules relating to the conduct of members*, 8 January 2019, clauses 9 and 18; UK House of Lords, *Code of Conduct for Members of the House of Lords; Guide to the Code of Conduct Code of Conduct for House of Lords Members' Staff*, 10<sup>th</sup> edition, July 2020, clause 10, p 3.

<sup>32</sup> UK Parliament, *Using the Independent Complaints and Grievance Scheme (ICGS): guide for complainants*, p 6, <https://www.parliament.uk/globalassets/documents/conduct-in-parliament/complainant-user-guide.pdf>.

Commissioner for Standards who decides whether the complaint should be upheld.<sup>33</sup> If a sanction beyond the Commissioner's powers is contemplated the Commissioner refers the matter to the Independent Expert Panel<sup>34</sup> which consists of eight external (lay) members appointed by the House.<sup>35</sup> The Panel determines the appropriate sanction in cases referred to it by the Commissioner, hears appeals against decisions of the Commissioner,<sup>36</sup> and reports to the House where it proposes a sanction that can only be determined by the House.<sup>37</sup>

- 2.22** In the House of Lords breaches of the Code of Conduct are investigated by the Commissioner for Standards<sup>38</sup> who in cases involving bullying, harassment or sexual misconduct is supported by independent investigators and may delegate to the investigator any of her investigatory functions.<sup>39</sup> If remedial action cannot be agreed the Commissioner reports to the House's Conduct Committee which having considered any appeal and agreed any sanction reports its conclusions to the House.<sup>40</sup>

### *Scotland*

- 2.23** In Scotland the Code of Conduct for members prohibits bullying, harassment including sexual harassment or other inappropriate behaviour towards other members or staff.<sup>41</sup> Complaints of breaches of the Code are investigated by the Ethical Standards Commissioner who reports findings of fact and conclusions to the Standards, Procedures and Public Appointments Committee which in turn reports to Parliament.<sup>42</sup> Complaints involving sexual harassment are submitted to the Independent Support Service which refers the complaint to the Commissioner.<sup>43</sup>

### *ACT*

- 2.24** In the ACT Legislative Assembly the Code of Conduct for members includes a requirement for members to comply with applicable policies and practices concerning discrimination,

<sup>33</sup> UK House of Commons, Standing Order 150(2)(f); UK Parliament, *Using the Independent Complaints and Grievance Scheme (ICGS): guide for complainants*, p 6, <https://www.parliament.uk/globalassets/documents/conduct-in-parliament/complainant-user-guide.pdf>.

<sup>34</sup> UK House of Common, SO 150(2)(f).

<sup>35</sup> SO 150A

<sup>36</sup> UK House of Common, SO 150A, SO 150B

<sup>37</sup> UK House of Common, SO 150A(5)(d)

<sup>38</sup> UK House of Lords, *Code of Conduct for Members of the House of Lords; Guide to the Code of Conduct Code of Conduct for House of Lords Members' Staff*, 10<sup>th</sup> edition, July 2020, p 27.

<sup>39</sup> UK House of Lords, *Code of Conduct for Members of the House of Lords; Guide to the Code of Conduct Code of Conduct for House of Lords Members' Staff*, 10<sup>th</sup> edition, July 2020, p 31.

<sup>40</sup> UK House of Lords, *Code of Conduct for Members of the House of Lords; Guide to the Code of Conduct Code of Conduct for House of Lords Members' Staff*, 10<sup>th</sup> edition, July 2020, p 6.

<sup>41</sup> Scottish Parliament, *Code of Conduct*, 7th edition, 2nd Revision, 7 January 2020, Section 7, paragraph 6.

<sup>42</sup> Scottish Parliament, *Guidance on the Code of Conduct for members of the Scottish Parliament*, last updated 2 February 2021, Section 9, paragraph 8.

<sup>43</sup> Scottish Parliament, *Sexual harassment policy: reporting procedures and support*, 21 March 2019, p 4.

harassment, bullying and equal employment opportunity.<sup>44</sup> Complaints about members' conduct are investigated by the Commissioner for Standards. The Commissioner reports to the Standing Committee on Administration and Procedure, except if the matter involved a minor or inadvertent failure to register or declare an interest and the member has taken action to rectify it.<sup>45</sup> The Committee determines what action will be taken in matters reported to it and includes its recommendation in a report to the House.<sup>46</sup>

### *Canada*

- 2.25** In the House of Commons, workplace harassment complaints about members by members' staff (including interns) are filed with the Chief Human Resources Officer (the CHRO) or other designated recipient. If the complaint cannot be resolved it is assigned to an investigator. If the investigator finds the complaint is substantiated the CHRO provides a redacted version of the investigator's report to the Board of Internal Economy. The Board determines whether further action is needed such as taking steps to refer the matter to the appropriate parliamentary body for the consideration and imposition of remedial or disciplinary measures.<sup>47</sup>
- 2.26** Complaints of non-criminal sexual harassment *between* members are dealt with under the *Code of Conduct for Members of the House of Commons: Sexual Harassment*. Under the Code the Chief Human Resources Officer (CHRO) may retain the services of an external investigator who provides a report that is submitted to the Whip. The Whip is required to provide the CHRO with a proposed course of disciplinary action. If the complainant or the respondent is not satisfied with the proposal the matter may be brought to the attention of the Standing Committee on Procedure and House Affairs.<sup>48</sup>
- 2.27** In the Senate, conduct that contravenes the *Policy on the prevention and resolution of harassment in the Senate workplace* may constitute non-compliance with the *Ethics and Conflict of Interest Code for Senators* (the Code).<sup>49</sup> There is a five-step enforcement process for breaches of the Code including inquiry by the Senate Ethics Officer and review by a designated committee.<sup>50</sup> However, if a matter before the Senate Ethics Officer relates to harassment, violence or abuse of authority under the Policy, the Senate Ethics Officer forwards the matter to an external firm

---

<sup>44</sup> ACT Legislative Assembly, *Code of conduct for all members of the Legislative Assembly*, Continuing resolution 5, agreed to 25 August 2005 amended 16 August 2006, 24 October 2013, 3 August 2017, paragraph 17.

<sup>45</sup> ACT Legislative Assembly, Continuing resolution 5AA, paragraphs (4) and (7).

<sup>46</sup> ACT Legislative Assembly, *Complaining about a member of the Legislative Assembly*, Update August 2019, p 1.

<sup>47</sup> Canadian House of Commons, *Members of the House of Commons workplace harassment and violence prevention policy*, approved by the Board of Internal Economy, 28 January 2021, [https://www.ourcommons.ca/Content/Boie/pdf/policy\\_preventing\\_harassment-e.pdf](https://www.ourcommons.ca/Content/Boie/pdf/policy_preventing_harassment-e.pdf)

<sup>48</sup> Marc Bosc and André Gagnon (ed), *House of Commons Procedure and Practice*, 3rd edition, 2017, chapter 4, [https://www.ourcommons.ca/about/procedureandpractice3rdedition/ch\\_04\\_9-e.html](https://www.ourcommons.ca/about/procedureandpractice3rdedition/ch_04_9-e.html)

<sup>49</sup> Canadian Senate, *Policy on the prevention and resolution of harassment in the Senate workplace*, p 6: [https://sencanada.ca/content/sen/committee/431/CIBA/Reports/CIBA\\_RPT4\\_e.pdf](https://sencanada.ca/content/sen/committee/431/CIBA/Reports/CIBA_RPT4_e.pdf)

<sup>50</sup> Canadian Senate, *Ethics and conflict of interest code for senators*, 16 June 2014, section 44(2).

retained by the Senate to manage complaints<sup>51</sup> which may appoint an external investigator.<sup>52</sup> The investigator reports to the Senate Ethics Officer who in turn provides a confidential report to the Standing Committee on Ethics and Conflict of Interest for Senators.<sup>53</sup>

### **Is the proposed amendment to the Code sufficient to cover instances of bullying and harassment?**

- 2.28** Submissions from the Clerk of the Parliaments, the Parliamentary Ethics Adviser and the Executive Director of the St James Ethics Centre all raised concerns about the way the amendment to the Members Code of Conduct has been worded:

Members must treat their staff and each other and all those working for Parliament in **a manner compatible with a safe workplace, free from harassment.**[bold added]

- 2.29** The Clerk of the Parliaments in his submission noted that the proposed amendment to the code suggested by the Presiding Officers to the Leaders of the Houses differed, using the words from the Code of Conduct for MPs in the UK House of Commons which requires members to treat “staff, each other and all those visiting or working for or with the Parliament with **dignity, courtesy and respect**” [bold added].<sup>54</sup> He acknowledged the prerogative of the Leaders of the Houses to propose an alternative form of words which seek to achieve the same effect in a different way. He also indicated that his understanding was that the reference to the sexual harassment provision in the *Anti-Discrimination Act*, in the proposed amendment, was not intended to limit the effect of the amendment to sexual harassment, but rather to draw member’s attention to that provision: “a legislative provision of which few Members seem to be aware”.<sup>55</sup>

- 2.30** The Parliamentary Ethics Adviser John Evans however was more critical, questioning whether the current phrase is sufficient:

What is meant by safe workplace and free from harassment? Is this meant to cover bullying and harassment as well as sexual harassment?<sup>56</sup>

- 2.31** The Executive Director of the St James Ethics Centre, Dr Simon Longstaff argued the change in wording takes the original principle based upon “respect” and replaces it with the minimum standard required by work health and safety legislation:

Whatever their motives, it is hard to conclude other than their watering down of the ethical commitment implied in the language of respect and dignity is intended to make

<sup>51</sup> The external firm is referred to in the Policy as the Impartial Third Party: Canadian Senate, *Policy on the prevention and resolution of harassment in the Senate workplace*, p 4: [https://sencanada.ca/content/sen/committee/431/CIBA/Reports/CIBA\\_RPT4\\_e.pdf](https://sencanada.ca/content/sen/committee/431/CIBA/Reports/CIBA_RPT4_e.pdf)

<sup>52</sup> Canadian Senate, *Policy on the prevention and resolution of harassment in the Senate workplace*, p 6: [https://sencanada.ca/content/sen/committee/431/CIBA/Reports/CIBA\\_RPT4\\_e.pdf](https://sencanada.ca/content/sen/committee/431/CIBA/Reports/CIBA_RPT4_e.pdf)

<sup>53</sup> Canadian Senate, *Policy on the prevention and resolution of harassment in the Senate workplace*, p 10: [https://sencanada.ca/content/sen/committee/431/CIBA/Reports/CIBA\\_RPT4\\_e.pdf](https://sencanada.ca/content/sen/committee/431/CIBA/Reports/CIBA_RPT4_e.pdf)

<sup>54</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments p 7.

<sup>55</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 6.

<sup>56</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 7.

life easier for members who, it seems, wish to avoid being held accountable to any standard other than the most basic requirements of the law.<sup>57</sup>

**2.32** Both Mr Evans and Dr Longstaff call on this committee to recommend a variation of the House of Commons rules in the following terms:

A Member must treat all those with whom they come into contact in the course of their parliamentary duties and activities (including parliamentary proceedings) with dignity, courtesy and respect, and free from any behaviour that amounts to bullying, harassment or sexual harassment.<sup>58</sup>

### *Committee view*

**2.33** The Committee supports the views of the Clerk, the Parliamentary Ethics Adviser and the Executive Director of the St James Ethics Centre that the Code of Conduct should have respect for others as the relevant principle rather than the weaker standard in the current resolution. However there are nuances and complications which cause the Committee some concern about adopting the broader expression of the duty in the way suggested.

**2.34** Firstly, the duty is expressed as owed to “all” in contrast to the proposed Code amendment in the current resolution which is more narrowly focussed on the parliamentary workplace: “their staff and each other and all those working for Parliament”. The UK model would cover all constituents and members of the public, interacting with members anywhere at any time. The potential for vexatious complaints is considerable. It is preferable to begin this initiative with a focus on improving standards in the parliamentary workplace, where most potential complainants have their own Codes of Conduct, and only expand the scope of the duty if it becomes clear that it is needed. A parliamentary respectful workplace will have its own impact on the electorate it serves.

**2.35** Secondly, the reference to “(including parliamentary proceedings)” is potentially problematic. Some of the theatre of parliament is easily characterised as bullying behaviour. Indeed, Question Time is the exemplar of what many, including some members of this committee, believe is wrong with the way in which members interact with each other, and detracts from public perceptions of the many co-operative and constructive ways in which Legislative Council members work together for the public good. The Committee acknowledges that some interactions in parliamentary proceedings can lead to harm; mental health of members is an important consideration as it is for all citizens.

**2.36** The way in which inappropriate and disorderly behaviour is currently dealt with in the chamber is for the presiding officer to intervene, either on a point of order or on their own initiative. If a member is dissatisfied with the approach taken there is the option, as a very last resort, to move dissent on the ruling. If this amendment to the Member’s Code of Conduct includes the reference to parliamentary proceedings it will create a second parallel path for complaint, enabling the Compliance Officer, a non-elected member who will be less familiar with the peer to peer relationships existing in the chamber, to investigate and come to their own conclusions. The potential for conflict can only undermine the position of the Compliance Officer or the presiding officer, or both.

---

<sup>57</sup> Submission 8, The St James Ethics Centre, p 2.

<sup>58</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 7.

- 2.37** If parliamentary proceedings are not explicitly referred to, there is one class of individuals that should be considered: witnesses and others interacting with parliamentary committees. In this regard the Committee notes clause 19 of the Procedural Fairness for Committee Participants resolution, which was adopted by the House on 25 October 2018, following an inquiry by this committee:

**Treatment of witnesses**

Witnesses will be treated with courtesy at all times.<sup>59</sup>

- 2.38** It is therefore the responsibility of a committee chair, supported by other committee members, to ensure that witnesses are treated with respect and courtesy. Where this does not occur, or where member to member behaviour in a committee hearing or other proceeding is the subject of serious concern, parliamentary processes such as a special report to the House and possible referral to the Privileges Committee provides a pathway for remedy.

---

**Recommendation 1**

That the amendment to the Members' Code of Conduct contained in clause 3 of the proposed resolution be in the following words:

“A Member must treat their staff and each other and all those working for Parliament in the course of their parliamentary duties and activities with dignity, courtesy and respect, and free from any behaviour that amounts to bullying, harassment or sexual harassment.”

---

**Is a different skill set required for a Compliance Officer responsible for receiving complaints on bullying and harassment?**

- 2.39** The original model put forward in 2014 by this committee called for a similar skill set for the current Parliamentary Ethics Adviser, including an understanding of entitlements and the pecuniary interest register. Both Legislative Council and Assembly committees considered the possibility that the two positions be merged.
- 2.40** In the current inquiry the Ethics Adviser, former Clerk of the Parliaments John Evans, notes the different skill set required for an officer to deal with bullying and harassment claims, although does not see this as a barrier to the creation of the Compliance Officer position:

In my humble view it would be difficult for a Compliance Officer primarily intended to deal with complaints concerning the Members' Code of Conduct, parliamentary entitlements and the pecuniary interests regime to also fulfil the role of grievance officer dealing with bullying and harassment and sexual harassment. I believe such role should be undertaken by an independent investigator with relevant expertise (for example a person seconded from the Anti-Discrimination Board) but with oversight by the Compliance Officer. The protocol under clause 5 (a) should have a process for dealing with remedies – such as training, apology or behaviour agreement – and reporting to

---

<sup>59</sup> *Minutes*, NSW Legislative Council, 25 October 2018, pp 3138-3140.

the Compliance Officer, who, in turn, in appropriate cases, could recommend sanctions against a Member to the Privileges Committee.<sup>60</sup>

**2.41** The Clerk in his submission considers the different skill set that may be required to deal with complaints of bullying and harassment. While noting that other Parliaments have appointed former judges, former Ombudsmen and senior lawyers to similar positions, the Clerk points to cl 5 (e) of the proposed resolution which gives the Compliance Officer the authority to engage the services of other expert persons to assist, including conducting investigations.<sup>61</sup>

**2.42** The supplementary submission from the PSA in supporting the proposed Compliance Officer highlights the specialised nature of bullying and harassment matters:

An accessible process for complaints and reporting of harmful interpersonal conduct which acts independently of the political context of Parliament, while also carrying the necessary powers to investigate and take appropriate action for such conduct, is a key element of the guiding principles of our process.

The Compliance Officer role that has been proposed and is the subject of this inquiry could appropriately carry out this function, providing the following considerations are implemented to prevent the re-traumatisation of complainants and enhance the accessibility of the complaints and reporting process...<sup>62</sup>

**2.43** The PSA then recommends that the officer:

- applies evidence based procedures that are transparent and available to all parties,
- receives regular training or hold relevant qualifications and experience to enable complaints be handled in a way which “does not create any further risks to the psychosocial health and safety of complainants or those subject to a complaint”,
- provide the right to a support person for both the complainant and those subject to a complaint, to accompany them to any meetings or interviews both complainant and those subject to a complaint,
- preserve the right of a complainant to retain control of how far the complaint is taken, and how information about the matters of complaint is used and shared, and
- develops processes used with the assistance of experts which specialise in the management of gendered violence, sexual misconduct, bullying, racism, disability discrimination and the management of workplace risks and hazards.<sup>63</sup>

**2.44** To enable this would also require sufficient funding, in the view of the PSA:

The Compliance Officer must have access to discretionary funding to facilitate specialist support for a complainant or someone considering making a complaint that is provided by a counsellor, psychologist, psychiatrist, or other kind of professional as is appropriate in the circumstances.<sup>64</sup>

---

<sup>60</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 8.

<sup>61</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments pp 5-6.

<sup>62</sup> Submission 4a, Ms Peta Waller-Byrant, PSA Delegate, Public Service Association of NSW, p 1.

<sup>63</sup> Submission 4a, Ms Peta Waller-Byrant, PSA Delegate, Public Service Association of NSW, p 2.

<sup>64</sup> Submission 4a, Ms Peta Waller-Byrant, PSA Delegate, Public Service Association of NSW, p 2.

2.45 Noting that the use of external assistance is to be “within budget” the Clerk in his submission explains the model envisaged by the Presiding Officers for this position is to be part time, without an office or staff, dealing with complaints as they arise, so any engagement of external expert assistance will be only for the individual complaint required.<sup>65</sup> The (then) Acting Ombudsman has offered his agency’s practical advice or assistance to the Compliance Officer in developing systems and processes, given its depth of experience in public sector complaints handling.<sup>66</sup>

2.46 It should also be noted that the Department of Parliamentary Services has an experienced and professional human resources branch, and in many cases may be the initial point of contact for complaints. The Compliance Officer will provide a referral point for an independent investigation of a complaint, but this is not to discount interim and lower key measures being able to be used, such as facilitating mediation when problems begin in a member’s office, for instance.

### *Committee view*

2.47 The Committee notes the approach taken by the House of Commons in the UK, where effectively a separate officer receives and investigates complaints related to the Behaviour Code, but with oversight from the Standards Commissioner, and that the Parliamentary Ethics Adviser supports this model. The committee believes that in many instances a retired judge or senior public servant may not be the easiest person for a young, inexperienced staff member to approach and discuss a complaint about a sensitive personal issue. On the other hand, such a person may be ideally suited to handling difficult issues with entitlements or conflicts of interest, and discussing matters with a Privileges Committee. The Committee believes the issues raised in the supplementary submission from the PSA are highly relevant considerations.

2.48 The Committee believes the resolution needs to expand the current conception of the role of an external investigator in clause 5 (e) to include appointing an appropriate expert to receive complaints relating to bullying and harassment issues.

---

## **Recommendation 2**

That:

- (a) an expert with appropriate skills and experience in dealing with bullying and harassment be available to the Compliance Officer to receive, as well as investigate, complaints, and clause 5 (e) be modified accordingly, and
- (b) where a complaint is made directly to this expert the Compliance Officer be notified.

---

<sup>65</sup> Submission 1, Clerk of the Parliaments, p 6 footnote 20.

<sup>66</sup> Submission 3, Mr Paul Miller, Acting NSW Ombudsman, p 2.

**Does the proposed resolution allow the Compliance Officer to investigate allegations of bullying and harassment by member's staff and ministerial staff?**

- 2.49** At the time of preparing this report there is an allegation that a sexual assault occurred in a ministerial office in Federal Parliament where the alleged perpetrator was a ministerial staffer. The current model for a Compliance Officer would not cover this situation for several reasons, the most important being that an allegation of a serious crime is a matter to be referred to the police not investigated by an officer charged with investigating harassment.
- 2.50** The proposed resolution is to give authority to investigate complaints about alleged actions by members, not their staff. There are already existing mechanisms to investigate misconduct by members staff and ministerial staff based upon current staff codes of conduct and policies specifically referencing bullying and harassment.<sup>67</sup> If the complaint was made about misconduct by a member's staff the allegation would be investigated by Human Services in the Department of Parliamentary Services, following the processes set out in the Anti-Bullying and a Harassment Free Workplace and Parliament's Grievance Policy. Under s15 of the *Members of Parliament Staff Act 2013* staff of special office holders, including the Leader of the Opposition and the office of the President are treated as members' staff rather than ministerial staff, so are covered under the Parliament's policy.
- 2.51** If a finding of serious misconduct is found against a member's staff and the member refuses to dismiss the staffer, the relevant Presiding Officer under s 20A of the *Members of Parliament Staff Act 2013* is empowered to suspend or dismiss the individual. This enables the Presiding Officers to discharge their responsibility for a safe workplace, as referred to above. In this respect the Presiding Officers are given more power than in the federal *Members of Parliament (Staff) Act 1984*.
- 2.52** If the complaint is against a ministerial staffer, under the 2013 Act the investigation is a matter for the Department of Premier and Cabinet to investigate, not the Parliament.
- 2.53** If a member alleges that they have been the subject of bullying and harassment by a staffer, it is possible to investigate that matter under existing processes, despite some difficulties which may arise because of the unique status of members. This includes sexual harassment, as s22B (7) of the *Anti-Discrimination Act 1977* contemplates that members can be victims of sexual harassment as well as perpetrators, although only incidents within the "workplace" are covered (see below).
- 2.54** The Chief Commissioner of the ICAC argues that the Compliance Officer's remit could be extended to include other staff employed by the Parliament, such as electorate officers:
- There are likely to be occasions when allegations against members and staff intersect and it may be efficient to deal with such matters using a single investigative process. In any case, the Compliance Officer will have specialist investigative skills that can be put to better use with a broader mandate.<sup>68</sup>
- 2.55** The Committee notes the supplementary submission from the PSA provides a statement of guiding principles for a reporting process for NSW Parliament staff covered by the *Members of Parliament Staff Act*. While going beyond the remit of the Compliance Officer, whose role is

---

<sup>67</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, pp 9-10.

<sup>68</sup> Submission 6, the Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 2.10.

focussed on complaints about members only, it is a strong statement of what is required to protect members' and ministerial staff, and for that reason is reproduced as Appendix 3.

*Committee view*

- 2.56** At present if a member and a member's staff are jointly involved in a matter, the subject of a bullying or harassment complaint, only the staffer can be investigated. The Committee is of the view that there are currently sufficient powers to investigate matters involving alleged misconduct by members' staff. However the issue raised by the ICAC is one which the Compliance Officer can come back to the Privileges Committee to seek modification of investigative powers if inefficiencies arise in future.
- 2.57** Aside from this, the Committee expects that the parliamentary administration would deal with complaints about members' staff and parliamentary staff expeditiously and decisively according to the Parliament's policies.

**Does the proposed resolution cover bullying and harassment of student interns and volunteers?**

- 2.58** Regular employees, whether members' staff or parliamentary staff, receive an induction coordinated by DPS which includes coverage of staff Code of Conduct issues and bullying and harassment policies. If a Compliance Officer is established the induction process will need to include raising awareness of the role of the position. However the Parliament frequently hosts university interns and work experience students, and some members also make use of volunteers. The level of induction given to these is minimal for interns and for volunteers entirely in the hands of the member. Given this and their relative youth and inexperience in the workplace it is important they are properly considered by any complaints process developed. As with any visitor to the parliament, these will be able to lodge complaints if they experience bullying or harassment from a member. It is important those responsible for arranging their placement in to the parliamentary environment bring the existence of the Compliance Officer process to their attention.

**Does the proposed resolution allow one member to complain they have been bullied by another member?**

- 2.59** As indicated above, allegations of sexual harassment by one member against another can be dealt with by the s22B (7) (b) of the *Anti-Discrimination Act 1977*, provided the incident has occurred at the "workplace" of both members. S22B (10) defines "workplace" in this context:

- (10) Without limiting the definition of workplace, the workplace of a member of either House of Parliament is taken to include the following—
- (a) the whole of Parliament House,
  - (b) any ministerial office or electoral office of the member,
  - (c) any other place that the member otherwise attends in connection with his or her Ministerial, parliamentary or electoral duties.

- 2.60** Section 22B (10) (c) appears to be open to an expansive interpretation, although would not cover purely social situations.

*Committee view*

- 2.61** The proposed amendment to the Members' Code of Conduct contained in the Compliance Office resolution clearly intends to cover actions by one member against another, by the inclusion of the words "and each other" in the amendment. There is potential for such complaints to be used politically, but this is part of a broader issue of how the officer would deal with the "weaponising" of the complaints process. Such matters need to be considered in the protocol for receiving complaints and conducting investigations, and is addressed in Chapter Four.

**Will the Compliance Officer be able to provide advice to members on staff related issues?**

- 2.62** There has been support from some members for an officer to be able to provide confidential advice to members on workplace issues, in much the same way that the Parliamentary Ethics Adviser is able to provide confidential advice on ethical issues. Clause 5 (d) provides for an advisory role to members, but only in relation to the Members' Entitlements scheme, not for workplace matters. Whether the advisory role should be expanded is considered in more detail in Chapter Three.

**Will the Compliance Officer investigate complaints about matters received prior to the position being established?**

- 2.63** In a recent debate on responses to sexual assault and harassment in the Legislative Assembly a member indicated that she had received a large amount of material relating to past complaints in the parliamentary workplace.<sup>69</sup> If any of these complaints relate to actions by members and are not of the severity requiring referral to police, the question is whether the Compliance Officer can investigate so called legacy issues. The current resolution is silent on this issue.

*Committee view*

- 2.64** The Committee believes this is a matter for the officer, once appointed, to consider when developing the investigation protocol (discussed in Chapter Four). Any complaint lodged should refer to a current serving member (at the time of the complaint being made) and relate to a time that they were a member. The decision should be made on the basis of need, not the resources available; such resources may need to be supplemented if the officer considered it appropriate to investigate earlier matters.

---

<sup>69</sup> *Votes and Proceedings* NSW Legislative Assembly, 24 March 2021, p 1126.

## Chapter 3 Appointment, Functions and Powers

This chapter discusses how the Compliance Officer is appointed, the roles required and the powers given to the officer to undertake these functions.

### How is the Compliance officer appointed?

**3.1** The Compliance Officer resolution at clause 1 directs the Presiding Officers to “make arrangements for the establishment” of the position. Clause 4 provides that the appointment shall be made “within three months of the mid-term point of each parliament and until the mid-term point of the following Parliament” with provision for a six month extension to ensure there is no period in which there is a vacancy.

**3.2** The terms of appointment under cl 4 also states:

The proposed appointment must have the support of the Privileges Committee in each House.

**3.3** No process is outlined for this support to be communicated, although the reference to “proposed appointment” suggests the Presiding Officers should ascertain that support prior to making the appointment.<sup>70</sup> This is a very important role for the Privileges Committees of both Houses, as the impartiality and independence of the person appointed is crucial to ensure the success of the position given the sensitivity and confidential nature of the types of complaints that may be referred to the officer.

**3.4** In his submission the Chief Commissioner of the ICAC suggests greater detail should be provided to the Presiding Officers in the selection process:

...to be able to undertake the proposed functions, any appointee would require both legal and investigative qualifications and a sophisticated understanding of parliamentary conventions. Should the proposal succeed, the Commission recommends that a detailed position description be prepared, which would help shape the likely pool of suitable candidates and assist in determining the suitable term of appointment.

One further option could be for the selection process to be informed by subject matter experts such as a retired judge or public administration specialist.<sup>71</sup>

**3.5** This implies the position will be advertised or at the least a pool of potential candidates invited and interviews conducted for the position. This would make it similar, for comparison, with the appointment process for the NSW Parliamentary Budget Officer. In the period leading up to each general election, the Presiding Officers are required to go through the following steps:

- The person must be a person selected from a list of at least 2 persons recommended by a panel comprising:

<sup>70</sup> For a more detailed example of an appointment process see s64A of the *Independent Commission Against Corruption Act 1988*, where the joint parliamentary committee overseeing the ICAC has a right of veto within 14 days of the Minister referring the appointment to the joint committee.

<sup>71</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, paras 4.5 – 4.6.

- (a) the Ombudsman, and
  - (b) the Information Commissioner, and
  - (c) the Chairperson of the Independent Pricing and Regulatory Tribunal.
- If the Presiding Officers decline to appoint a person from a list of persons recommended by the panel, the panel is required to recommend a further list.<sup>72</sup>

**3.6** The Compliance Officer in its current form is however more comparable to the Parliamentary Ethics Adviser, being a part time role without an office. To date the process has been for the Presiding Officers to invite a suitable candidate (most recently a former Electoral Commissioner and a former Clerk of the Parliaments) then having the appointment made by resolution in each House.<sup>73</sup>

#### *Committee view*

**3.7** The Committee believes the inclusion of the role for the Privileges Committee in the appointment process is sufficient at this stage to ensure a suitable candidate is appointed, and as a safeguard against any unsuitable appointments being proposed.

**3.8** In effect each House would delegate to their Privileges Committee the responsibility to endorse the Presiding Officers' choice. It is open to the Presiding Officers to incorporate some of the ICAC Commissioner's suggestions in their search for a suitable candidate, but the Committee does not believe they are essential to ensure an impartial appointment. The Committee does not believe there needs to be a change to the current resolution.

#### **How can the Compliance Officer be dismissed?**

**3.9** As stated above, cl 4 (a) states that the appointment is for one parliamentary term, with a six month extension, although timed for the middle of each parliament rather than its beginning. However the proposed resolution considers the Compliance officer can be dismissed before the term concludes:

4 (b) Dismissal

The Compliance Officer may only be dismissed by the Chief Executive Officer of the Department of Parliamentary Services with the consent of the President and Speaker.

**3.10** The Chief Commissioner for the ICAC in his submission expresses concern about the proposed appointment process:

The independence and impartiality of the Compliance Officer is essential. ...that is best achieved if the officer is external. However according to the proposal outlined in the terms of reference it does not appear that the Compliance Officer will be "external" as s/he is to be appointed by the Presiding Officers, making them a parliamentary employee, who can be dismissed by the Chief Executive Officer of the Department of Parliamentary Services with the consent of the President and Speaker.

.....

---

<sup>72</sup> *Parliamentary Budget Officer Act* 2010, s 6.

<sup>73</sup> *Minutes* NSW Legislative Council 18 June 2014 p 2597 -2600.

The Commission agrees the selected Compliance Officer should be apolitical and be free to perform his or her duties unencumbered of any political interference.<sup>74</sup>

**3.11** The Parliamentary Ethics Adviser did not support the proposal for the Chief Executive Officer to be the person empowered to dismiss the officer, suggesting that the terms of dismissal should be on the advice of the Clerks and be included in the contract of appointment rather than a resolution of the House.<sup>75</sup>

**3.12** In his submission the Clerk of the Parliaments notes feedback he has received querying why the Chief Executive is the decision maker in dismissal when the Chief Executive is not involved in the appointment of the position. The Clerk notes that the Compliance Officer would not be an employee of the Department of Parliamentary Services, and so this method of dismissal is an anomaly which needs to be rectified:

Clause 4 (b) could be omitted, leaving the circumstances in which termination is permitted to be set out in the contract of appointment. This is what occurs in relation to the Parliamentary Ethics Adviser – clause 12 of the contract between the two Clerks and the Ethics Adviser sets out the circumstances in which the Clerks may terminate the contract.

If clause 4 (b) remains, though, it needs to be amended to refer not only to the Chief Executive of the Department of Parliamentary Services but also the two Clerks, as each of us have an equal stake in all matters concerning this proposed position and should each be signatories to the contract for services and, in the unlikely event it were to occur, any dismissal.<sup>76</sup>

### *Committee view*

**3.13** The Committee agrees with the views of the Chief Commissioner of the ICAC, the Parliamentary Ethics Adviser and the Clerk of the Parliaments that cl 4(b) as drafted is not an appropriate mechanism for dismissal of the Compliance Officer. The Compliance Officer is not an employee of DPS, yet the current resolution treats the officer as if they are under the direction of the Chief Executive. The Clerks of both Houses have the same interest in the success of the position and all three department heads should be identified if this is to be the mode of dismissal.

---

### **Recommendation 3**

That clause 4 (b) be omitted from the proposed resolution and the terms of dismissal be instead included in the contract of employment offered by the Presiding Officers, expressed in similar terms to that of the contract of employment for the Parliamentary Ethics Adviser.

---

<sup>74</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 4.1., 4.4.

<sup>75</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, pp 8-9.

<sup>76</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 8.

**Are the investigatory functions allocated to the Compliance Officer sufficient?**

**3.14** Clause 2 of the proposed resolution sets out four functions of the position:

- a. Receive and investigate complaints
- b. Monitoring the code of Conduct for Members
- c. Educational presentations, and
- d. Informal advisory services.

**3.15** It is expected that the complaint handling function will be the major part of the position, as defined in clause 2(a):

Receive and investigate complaints

The Compliance Officer may receive and investigate complaints confidentially in relation to alleged breaches of the members' code of conduct, not related to conduct in proceedings of the Legislative Council or Legislative Assembly or their committees, including:

- (i) Misuse of allowances and entitlements
- (ii) Other less serious misconduct matters falling short of corrupt conduct
- (iii) Allegations of bullying, harassment and other types of grievances,
- (iv) Minor breaches of the pecuniary interests disclosure scheme.

**3.16** These functions should be read in the context of clause 1 (Establishment of position) which states that the purpose of the position is to deal expeditiously and confidentially with "low level, minor misconduct matters". However the Parliamentary Ethics Adviser argues that this creates some ambiguity:

It is unclear what is meant by "low level, minor misconduct", "less serious misconduct" and "minor breaches". Surely the Compliance Officer should be able to investigate any matter relating to alleged breaches of the Members' Code of Conduct and failure to disclose pecuniary interests. Conduct amounting to corrupt conduct would necessarily be brought to the attention of the Independent Commission Against Corruption.<sup>77</sup>

**3.17** The Chief Commissioner of the ICAC shared similar concerns:

... it will be difficult to determine, at the commencement of an investigation, whether the alleged conduct could meet the definition of corrupt conduct. In the Commission's experience, investigations into allegations of minor misconduct can lead to the identification of more serious or systemic misconduct.<sup>78</sup>

**3.18** The Commissioner notes that under its Act, the ICAC has the capacity to refer a matter for investigation to any person or body considered by the Commission to be appropriate, even if the alleged conduct could amount to "corrupt conduct". For that reason the ICAC recommends

---

<sup>77</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, pp 4-5.

<sup>78</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 2.9.

that the remit of the Compliance Officer be extended to potentially include matters that could amount to corrupt conduct, provided satisfactory liaison arrangements with the Commission are established for the position.<sup>79</sup> This will be examined in the next chapter in relation to investigation protocols, as well as the issue about a matter being referred to the Compliance Officer when it has already been referred to the ICAC.

### *Committee view*

- 3.19** The Committee acknowledges the concerns of the Chief Commissioner of the ICAC and the Parliamentary Ethics Adviser but believes these issues are best made the subject of discussions between the ICAC and the Officer once appointed, noting the investigations protocol will be brought to each House for adoption. If the functions of the position need to be also reviewed this would be the preferable time to do so.

### **Are the monitoring functions assigned to the Compliance Officer likely to be effective?**

- 3.20** While clause 2 (a) deals with receiving of complaints, the rest of the clause assigns monitoring and educative functions:

- (b) Monitoring Code of Conduct for Members

The Compliance Officer shall monitor the operation of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation) 1983 and the members' entitlements system, and provide advice about reform to the Privileges Committee as required.

- (c) Educational presentations

The compliance Officer shall assist the Privileges Committee, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the Constitution (Disclosures by Members) Regulation) 1983.

- (d) Informal advisory services

A member or the parliamentary administration may seek confidential advice on a matter of interpretation of the Members' Entitlements scheme for the purpose of resolving any disagreements.

### ***Monitoring of disclosure requirements***

- 3.21** The Chief Commissioner of the ICAC expressed scepticism about the effectiveness of monitoring of the register, given the current system is essentially self-regulating:

...compliance and deterrence depend on effective enforcement mechanisms, the proposed monitoring by the Compliance Officer is likely to provide merely administrative oversight (similar to the role performed by the Clerks in regard to the compilation of members' disclosure for the pecuniary interest register) rather than a substantive compliance function....the Commission proposes that an effective regime

<sup>79</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 2.5.

requires monitoring and enforcement powers. This may necessitate amendments to the existing regulation [the Constitution (Disclosures by Members) Regulation 1983].<sup>80</sup>

**3.22** In regard to monitoring the Code of Conduct, the ICAC Chief Commissioner made a similar point, that the limitations of the current system will impact on the effectiveness of the functions proposed. The Chief Commissioner noted that a range of previous recommendations regarding the Code of Conduct made by this Committee and its Assembly counterpart have not been implemented.<sup>81</sup> Citing that the current Code (at clause 7) requires members to take reasonable steps to avoid, resolve or disclose any conflict of interest, including in any communication with Ministers, members, public officials, or public office holders, the ICAC Chief Commissioner concludes:

In the absence of a mandatory requirement for a specialised register of members' conflicts of interests, it is not clear to the Commission how a Compliance Officer could perform the monitoring function of members' disclosure of their conflicts of interest effectively.<sup>82</sup>

**3.23** The Parliamentary Ethics Adviser explains that the Standards Commissioner for the UK House of Commons actually administers the declarations and registration of financial interests. If after an investigation the Commissioner finds there is a non-registration of an interest an entry is made in the register in *bold italics* with an explanatory note. Non-declaration of an interest requires an apology to the House.<sup>83</sup>

**3.24** Currently in the NSW Parliament the Clerk of each House maintains the register of interests, and either the Clerk or the Parliamentary Ethics Adviser can provide confidential advice to members on declarations on the register. The function of the Compliance Officer to receive and investigate complaints about alleged breaches of the disclosure requirements of the Code and of the Regulation is intended to separate the advisory role of the Clerk and Ethics Adviser from an investigatory role.

**3.25** There is a potential overlap of the functions given to the Compliance Officer with the NSW Audit Office in relation to the monitoring of the members' entitlements system in clause (2) (b). The Auditor-General Ms Margaret Crawford in her submission notes that the annual Tribunal Determination under the *Parliamentary Remuneration Act 1989* states that Members' additional entitlements shall be the subject of an external assurance process conducted by the Auditor General, and in response the Audit Office performs an annual compliance review.<sup>84</sup> The Audit Office reports to Parliament with the results of this annual review outlining instances of non-compliance by members, who are not identified by name, and highlighting where additional guidance is required. The Parliament's internal audit provider also reviews every member's use of entitlements at least once each parliamentary term.

---

<sup>80</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 2.16.

<sup>81</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 2.15.

<sup>82</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 2.14.

<sup>83</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, pp 4-5.

<sup>84</sup> Submission 5, Ms Margaret Crawford, Auditor General, Audit Office of New South Wales, p 1.

*Committee view*

- 3.26** The resources of the Audit Office will significantly exceed that available to the Compliance Officer. The monitoring role of the position is likely to be more ad hoc in nature, but this function could be undertaken by a liaison with the Audit Office and/or internal auditors when the Compliance Officer becomes aware of a problem, most likely arising through investigation of individual complaints. While the Compliance Officer in the annual report to Parliament can note entitlements issues arising, these reports could also become a useful contribution to the Audit Office's annual process and to Parliament's internal audit process.

**Recommendation 4**

That the Compliance Officer, once appointed, liaise with the Audit Office and Parliament's internal audit provider to establish a co-operative working relationship in regard to the monitoring of entitlements.

*Educative role*

- 3.27** The educative role as described in the resolution is very much in support of existing roles given to the Privileges Committee and the Clerk, in the same way the Parliamentary Ethics Adviser assists in training programs. In induction of new members it would be important that the Compliance Officer attend and explain their role.
- 3.28** Members need to be routinely informed and reminded of their Code of Conduct obligations. This can take the form of regular briefings, such as that hosted by the Privileges Committee for Legislative Council Members in 2020, by educational resources such as the EdApp mobile phone based education modules distributed to members in March 2021, or by other means.

**Is the advisory function of the compliance office sufficiently described?**

- 3.29** Clause 2 (d) provides that a member or the parliamentary administration may seek confidential advice from the Compliance Officer. However this role is limited – the advisory role is only in relation to entitlements issues, “for the purposes of resolving disagreements”. To some extent this is simply providing an alternative source of advice to the Entitlements section in the Department of Parliamentary Services, although the range of advice able to be given may be wider than that able to be provided by the parliamentary administration. It is clear that in its current form the officer is not empowered to give advice on bullying and harassment matters, nor on any other minor breaches of the Code not related to entitlements.

*Committee view*

- 3.30** The Committee believes the advisory function as drafted is currently too narrow. The Ethics Adviser currently plays a useful role to members in providing a confidential source of advice on a range of ethical issues. The Compliance Officer could likewise provide a source of independent and confidential advice on matters affecting members, such as entitlements and disclosure requirements. For bullying and harassment issues, as indicated in the previous chapter, it may be that the Compliance Officer should appoint someone expert in handling these matters to receive complaints as well as investigate them. If so, this expert could also provide

advice to members on how to deal appropriately with these matters. Also, the Compliance Officer (or the expert appointed to deal with bullying and harassment) could be empowered to provide prompt referral to members seeking advice in this areas. Agencies such as the Ombudsman, the Anti-Discrimination Board, Safework NSW, the Fair Work Ombudsman, unions and some private firms are all able to provide advice and assistance on bullying and harassment issues. The Compliance Officer could maintain contacts to effectively provide an expert panel to draw upon as appropriate.

---

### **Recommendation 5**

That the words “or any other matter within the complaints handling functions of the position” be added to the end of clause 2(d), to enable the officer to provide advice on issues of bullying and harassment.

---

### **Could the non-complaint functions of the Compliance Officer be made clearer?**

- 3.31** It could be argued that paragraphs 2(b), (c) and (d) provide some ambiguity as to the extent of the role beyond receiving and investigating complaints, particularly as the monitoring, advisory and educative roles overlap with responsibilities already given to the Parliamentary Ethics Adviser, the Clerk and the Privileges Committee. In his submission the Parliamentary Ethics Adviser suggests a redraft of the functions of the position that focuses on the complaints and investigatory functions:

#### **Functions of Compliance Officer**

(1) The Compliance Officer has the following functions:

- (a) to receive and investigate complaints of alleged breaches of the Code of Conduct for Members, but not in relation to any proceedings in the House or a Committee, *(proposed (2) (a))*
- (b) to receive and investigate complaints of bullying, harassment and sexual harassment under the Code of Conduct for Members, *(proposed (2) (a) (iii))*

*(this is presuming a provision is inserted in the Code of Conduct)*

- (c) to receive and investigate complaints of alleged breaches of the disclosure of pecuniary interests under the Constitution (Disclosures by Members) Regulation 1983, *(proposed (2) (a) (iv))*
- (d) to receive and investigate complaints of the misuse of additional entitlements provided to Members under Part 3 of the Parliamentary Remuneration Tribunal Act 1989, *(proposed (2) (a) (i))*
- (e) to provide advice to the Privileges Committee on any reform necessary on matters within the functions of the Compliance Officer, *(proposed (2) (b))*
- (f) to provide confidential advice, on request, to a Member or relevant staff of the Parliament on the interpretation of additional entitlements available to Members under the Parliamentary Remuneration Tribunal Act 1989, solely for the

purpose of resolving any disagreement on interpretation of additional entitlements, and *(proposed (2) (d))*

- (g) to provide, information, training and education to Members of their obligations under the Code of Conduct and pecuniary interest regime. *(proposed (2) (c))*

*(Note: Clause 2 (1) (g) is to be done in conjunction with the Privileges Committee, the Clerk of the Parliaments and the Parliamentary Ethics Adviser)*

- 3.32** The Ethics Adviser believes clauses 2 (b) – (d) could easily be included in a protocol to be developed by the Officer and brought back to the House.<sup>85</sup>

### ***Committee view***

- 3.33** The Committee believes the proposed functions of the Compliance Officer are clear and appropriate in relation to receiving and investigating complaints. The protocols with other agencies and officers and the way in which investigations are conducted, to be considered in the next chapter, are important to how effective the officer will be in undertaking these functions.
- 3.34** The Committee accepts some of the criticisms of the Chief Commissioner of the ICAC in relation to the monitoring functions assigned to the position. To address this requires changes to both the Members' Code of Conduct and the Constitution (Disclosures by Members) Regulation 1983, changes which have been flagged in previous reports of this Committee.<sup>86</sup>
- 3.35** The Committee does not want to delay the establishment of the Compliance Officer position by widening the scope of its current inquiry. Under its terms of reference the Committee is required to review the Code of Conduct once each Parliament. The next review this Committee undertakes would allow it to return to the issues raised by the ICAC and how they impact on the functions of the Compliance Officer.

### **Are the powers proposed for the Compliance Officer sufficient for the investigation role?**

- 3.36** Clause 6 states that the Compliance Office has the power to call for the production of “relevant documents and other records” from members and officers of the Parliament. Importantly the resolution also requires members, their staff and parliamentary officers to “reasonably cooperate” including “giving a full, truthful and prompt account of the matters giving rise to a complaint.” This gives the officer the authority to interview staff and members, which is significant because at present if a complaint was made concerning a member no-one in the parliamentary administration has the power to require participation by a member. The enforcement of these powers is given to the House – the Compliance Officer can report failure to comply, and it is then up to the House to determine the matter.

<sup>85</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 5.

<sup>86</sup> Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosures regime and a parliamentary investigator*, Report 70, June 2014.

- 3.37** The Clerk of the Parliaments advises that in his view the power to order documents does not distinguish between ministers and other members provided the documents are relevant to the investigation.<sup>87</sup>
- 3.38** The Chief Commissioner of the ICAC does not query the grounding of these powers in a resolution of the House rather than the alternative, by legislation.<sup>88</sup> However the Chief Commissioner suggests there is value in amending both the Members' Code of Conduct and the Members Staff Code of Conduct to ensure the officer has the authority to use these powers.<sup>89</sup> The *UK's Code of Conduct for Members of Parliament* under the section entitled "Upholding the Code" provides the Commissioner for Standards with relevant powers:
- The Commissioner may investigate a specific matter relating to a Member's adherence to the rules of conduct under the Code. Members shall cooperate, at all stages, with any such investigation by or under the authority of the House. No Member shall lobby a member of the Committee in a manner calculated or intended to influence its consideration of an alleged breach of this Code.
- The Committee will consider any report from the Commissioner to it and report its conclusions and recommendations to the House. The House may impose a sanction on the Member where it considers it necessary.<sup>90</sup>
- 3.39** The Members' Code of Conduct for members of the NSW Parliament currently has a section headed "upholding the Code":
- Clause 9*
- Members have a duty to cooperate fully with any processes established under the authority of the House concerning compliance with this Code.
- Breaches of this Code may result in actions being taken by the House in relation to the Member. A substantial breach of this Code may constitute corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988*.
- 3.40** The reference here is to substantial breaches, whereas the Compliance Officer is intended to receive complaints on matters which fall short of the ICAC definition of corrupt conduct. An amendment would be to add to the second paragraph an acknowledgment that the House may also take action for minor breaches of the Code.
- 3.41** The Parliamentary Ethics Adviser recommends leaving the powers of the position to a later resolution of the House following the development of a protocol by the officer once appointed.<sup>91</sup>

---

<sup>87</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 10.

<sup>88</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 6.2.

<sup>89</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 6.3.

<sup>90</sup> UK Code of Conduct for Members of Parliament  
[https://publications.parliament.uk/pa/cm201719/cmcode/1882/188202.htm#\\_idTextAnchor000](https://publications.parliament.uk/pa/cm201719/cmcode/1882/188202.htm#_idTextAnchor000)

<sup>91</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 10.

*Committee view*

- 3.42 There is considerable merit in the suggestion made by the Chief Commissioner of the ICAC. Inclusion of reference to the Compliance Officer in the relevant section of the Members' Code of Conduct would emphasize the power given is in the context of enforcement of the Code. Without this amendment the Code would convey an impression that only substantial breaches of the Code would be enforced by the House. As the Compliance Officer resolution already includes an amendment to the Code of Conduct by the addition of a clause regarding bullying and harassment, this could be included as part of clause 5.

**Recommendation 6**

That clause 3 of the proposed resolution be amended to require the second paragraph of clause 9 of the Member's Code of Conduct to refer to the Compliance Officer, as follows:

“Breaches of this Code may result in actions being taken by the House in relation to the Member. A substantial breach of this Code may constitute corrupt conduct for the purposes of the Independent Commission Against Corruption Act 1988. A minor breach of this Code may be the subject of an investigation by the Compliance Officer”.

**Do the powers to investigate extend to Ministers and Ministerial staff?**

- 3.43 Ministers and parliamentary secretaries are covered by a Ministerial Code of Conduct, which has specific disclosure requirements and has more onerous obligations than for ordinary members, particularly regarding conflicts of interest.<sup>92</sup> Breaches of this Code can be investigated by the ICAC under the same statutory provisions which empower the agency to undertake investigations for substantial breaches of the Members Code of Conduct. The Compliance Officer is not empowered to investigate breaches of the Ministerial Code.
- 3.44 However, every Minister is also a member of parliament, and is therefore bound by the Members' Code of Conduct. If a complaint is made against a Minister that relates to a minor breach of the Members' Code, the Compliance Officer can investigate. There is no distinction made between Ministers and other members of parliament.<sup>93</sup>
- 3.45 The situation for ministerial staffers is however different depending on whether they are the subject of the complaint or the person making the complaint. Under s7 of *Members of Parliament Staff Act 2013* employment conditions of ministerial staff are determined by the Premier. Misconduct can be investigated as disciplinary matters under existing mechanisms.
- 3.46 When a ministerial staffer seeks to lodge a complaint about a member, whether they are their Minister or another member the position is different – the staffer is able to make a complaint and have it investigated by the Compliance Officer. This may provide an option to a ministerial staffer to pursue a complaint for independent investigation outside of their current structure.

<sup>92</sup> Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Regulation 2014.

<sup>93</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 9.



## Chapter 4 Investigations and Referral Protocols

This chapter considers the investigations protocol required to be developed by the Compliance Officer once appointed. This protocol is to include the referral mechanisms to other agencies.

### How will complaints be received and investigated?

- 4.1 The proposed resolution is not intended to be prescriptive as to how the Compliance Officer will receive complaints and conduct investigations. Clause 5(a) requires the officer within three months of appointment to develop a protocol to cover these matters, such protocol being approved by the Privileges Committee then later tabled in the House. This protocol is required to cover:
- how complaints are received,
  - the manner and method by which they are assessed and investigated,
  - the definition of “low level, minor misconduct”, and
  - arrangements for referral of matters between the Compliance Officer and the ICAC and other relevant bodies.
- 4.2 The Clerk of the Parliaments advises that this is based upon the model of the ACT Legislative Assembly which also requires the Commissioner to develop such a protocol within three months of appointment.<sup>94</sup> During the original research work undertaken in 2016 and 2017, a draft protocol was prepared, and while this could be provided to the officer the Clerk in his submission advises it is only a draft prepared for assistance.
- 4.3 The website of the Commissioner for Standards in the UK provides plain language advice on the way to make a complaint, how this is investigated and what happens next in a “Frequently Asked Questions” document.<sup>95</sup> In information on the website about the Behaviour Code for Members, the steps to make a complaint are explained as follows:
- Step 1: Details of a complaint are taken from a helpline or by emailing the Standards Commissioner
  - Step 2: The Commissioner completes a preliminary assessment to decide whether to go to a full investigation. This assessment includes identifying potential witnesses and what is hoped to be achieved as an outcome, including options for informal resolution.
  - Step 3: The Commissioner discusses the complaint further with the complainant, requests additional evidence such as emails and any witnesses necessary to complete the investigation. The subject of the complaint will also be interviewed. An external independent investigator may conduct some or all of this investigation stage.
  - Step 4: After reviewing all the evidence, the investigator will produce a report detailing their findings and whether the complaint should be upheld or not upheld. The

<sup>94</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p8.

<sup>95</sup>

complainant, the subject of the complaint and the relevant HR Team will all receive copies of the report.<sup>96</sup>

- 4.4** The information goes on to explain to those wishing to make a complaint that there are four possible outcomes:
1. A finding of no breach of the Code;
  2. A resolution is agreed with the complainant and respondent during the investigation process and the investigation is concluded without a formal finding;
  3. The Commissioner finds a breach of the Code and, at the end of the investigation, identifies appropriate remedial action such as an apology or training; or
  4. The Commissioner finds a breach of the Code and remedial action cannot be agreed or would not be appropriate.
- 4.5** In his submission the Chief Commissioner for the ICAC argues that the investigation protocol needs to provide detailed information on how to make a complaint with the level of formality required, and that like the UK Commissioner process it must be clear that members of the public can lodge complaints.<sup>97</sup>
- 4.6** An issue raised by the Clerk of the Parliaments is whether Members and other parties will have access to legal advice and representation, and how this will be funded. The Clerk suggests the model is based upon the expeditious resolution of complaints, ideally without the need for legal advice or representation, but that the investigation protocol needs to consider this issue.<sup>98</sup> The position does not currently have funding for legal assistance, the only reference to engaging external assistance to perform services for the Compliance Officer states that these may be engaged “within budget” (clause 5(e)).
- 4.7** Representation by a union or support person for complainants, members the subject of complaints or witnesses, is also not considered in the proposed resolution but could be included in the investigation protocol, should the Compliance Officer or the Privileges Committee (in considering its approval of the protocol) wish to address this matter.<sup>99</sup>
- 4.8** Those who have made submissions to the inquiry appear generally supportive of the approach taken to require the Compliance Officer to develop their own protocol for investigations once appointed, with the safeguard that this will need to be approved by the Privileges Committees of both Houses. As discussed in Chapter Two, the PSA has emphasized the importance of the manner in which investigations are carried out needs to be sensitive to preserving the right of the complainant or someone considering a complaint, to retain control of how far their complaint is taken and how information is shared, while following evidence based procedures that are fair to both complainant and the person the subject of the complaint.<sup>100</sup> The current

---

<sup>96</sup> [https://www.parliament.uk/contentassets/3df71b70e8e847f498932d63dede801a/icgs-bullying-user-guide\\_complainants\\_interactive-pdfs\\_update.pdf](https://www.parliament.uk/contentassets/3df71b70e8e847f498932d63dede801a/icgs-bullying-user-guide_complainants_interactive-pdfs_update.pdf)

<sup>97</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption para 2.12.

<sup>98</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 8.

<sup>99</sup> See Submission 4a, Ms Peta Waller-Byrant, PSA Delegate, Public Service Association of NSW, p 2.

<sup>100</sup> Submission 4a, Ms Peta Waller-Byrant, PSA Delegate, Public Service Association of NSW, p 2.

resolution does however, at clauses 5 (b) to (d), specify how the officer will report or not report depending upon the conclusions reached during the investigation. (See below regarding confidentiality).

**How will the position interact with existing HR functions within the parliamentary administration?**

- 4.9** Currently when a member's staff or other person in the parliamentary workplace experiences difficulty in their workplace they will either approach the office of their respective Clerk or more frequently go to the People and Engagement (HR) section of the Department of Parliamentary Services. Members likewise have access to the same services. Problems can be dealt with at the point at which they are beginning to develop, conversations with a member or facilitated discussions can significantly improve misunderstandings or differing expectations. The Compliance Officer position however fills a gap where currently more intractable problems or more serious incidents are left without any mechanism for further investigation or action. As stated in Chapter Two, members are currently the only individuals in the parliamentary workplace not bound by policies preventing bullying and harassment.
- 4.10** There will be other circumstances where the officer will need to interact with Parliament's HR function – for instance where the potential complaint involves a members' staff as well as a member so has staff Code of Conduct implications, or where an individual decides not to proceed with a complaint but is in need of ongoing support.
- 4.11** The Compliance Officer will need to work with the HR function of DPS to work out protocols for referral, and provide guidance as to the circumstances in which such referrals will be made.

---

**Recommendation 7**

That the referral protocol to be developed by the Compliance Officer include guidance as to:

- (a) how to receive complaints or potential complaints originally referred from the human resources function of the parliamentary administration,
  - (b) in what circumstances it is appropriate to refer a potential complainant to human resources if they do not wish to proceed with their complaint but require other support, and
  - (c) in what circumstances human resources may be able to assist members with advice on staff matters.
- 

**How will duplication with other agency investigations be avoided?**

- 4.12** The Compliance Officer is intended to fill a gap in current accountability measures. When a complaint is received it may not always be clear how serious the matters are, and there may also be fresh matters uncovered during the investigation. A complaint of sexual harassment may, when investigated, find witnesses providing evidence of matters more properly dealt with by the Anti-Discrimination Board or the Police. An apparent minor breach of the Code, once investigated, may identify more significant breaches requiring referral to the ICAC. As previously indicated, investigations regarding entitlements may need to be brought to the attention of the Audit Office or the Parliament's internal audit provider.

- 4.13** A very important part of this position is therefore to establish effective protocols and relationships with other accountability bodies. The main agencies are discussed below.

*The ICAC*

- 4.14** The Chief Commissioner of the ICAC expressed particular concern:

...a key element of the Commission's previous proposals is that the role of a parliamentary investigator does not impinge upon the Commission's jurisdiction or the definition of corrupt conduct pursuant to the Independent Commission Against Corruption Act 1988.<sup>101</sup>

- 4.15** The Commission highlights concern that there is no process in the resolution for the Commission to be informed of an investigation by the Compliance Officer.<sup>102</sup> The Commissioner notes that the ICAC may be investigating a matter which is reported at the same time to the Compliance Officer. As the Compliance Officer's investigation and resolution of complaints are intended to be much quicker than the more extensive inquiries undertaken by the ICAC there is potential that the Compliance Officer may reach conclusions which may later be at odds with an ICAC inquiry.

- 4.16** The related issue raised by the ICAC is that under s53 (1) of the *Independent Commission Against Corruption Act 1988* the Commission has the power to refer a matter for investigation to any person or body considered to be appropriate in the circumstances, even where the alleged conduct could amount to corrupt conduct:

Because corruption can cover a wide range of misconduct, including conduct that is not necessarily criminal in nature, many instances of relatively minor fraud, misuses of information or abuses of office can be satisfactorily investigated by the wrongdoer's own agency.<sup>103</sup>

...It will be difficult to determine, at the commencement of an investigation, whether the alleged conduct could meet the definition of corrupt conduct. In the Commission's experience, investigations into allegations of minor misconduct can lead to the identification of more serious or systemic misconduct.<sup>104</sup>

- 4.17** For that reason the ICAC argues that the Compliance Officer should be empowered to investigate matters potentially including matters of corrupt conduct, provided satisfactory liaison arrangements are made between the Compliance Officer and the Commission. The protocol should allow the Commission to retain an interest in the investigation that it refers to the Compliance Officer, and provide an explicit provision that the Commission can in certain circumstances assume the investigation of a complaint that has initially been received by the Compliance Officer.

---

<sup>101</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption para 2.2.

<sup>102</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption para 2.3.

<sup>103</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption para 2.5

<sup>104</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption para 2.9.

*Committee view*

- 4.18 There is a very strong need for the Compliance Officer to hold discussions with the ICAC during the development of an investigation protocol. The position has been proposed primarily because of concerns there is a gap in the current accountability system where the ICAC cannot investigate minor breaches of the Members Code of Conduct. When a complaint is made to the ICAC it may be many months before a member will be advised that the matter is not to be pursued, during which time the member's status is in limbo.
- 4.19 A Memorandum of Understanding with the ICAC would be an important outcome from these negotiations. Suggestions made by the Chief Commissioner such as a notification process when an investigation is to be pursued by the Compliance Officer could form part of this MoU.
- 4.20 On the other hand, it will be important that the position retains its own independence and that a complainant, hoping for a quick resolution of what is considered a minor complaint, does not without warning find their complaint taken over by the much more complex process of the Commission.
- 4.21 Changing the powers of the Compliance Officer to include matters that could "potentially" include matters that could amount to corrupt conduct is not supported at this stage – it may lead to confusion as to the role of the Compliance Officer, and given the limited resources likely to be available it would be preferable to deal with this issue in a referral process in the MoU.
- 4.22 The Compliance Officer may, in the course of an investigation into an apparently minor breach of the Code, discover instead that it is the tip of an iceberg and there are substantial breaches of the Code amounting to corruption. If so the Compliance Officer, like any ethical citizen, would, the Committee expects, refer the matter to the ICAC as the appropriate body to investigate.

**Recommendation 8**

That as part of the development of an investigation protocol the Compliance Officer prepare a draft Memorandum of Understanding with the ICAC, including a notification process.

*The Office of the Ombudsman and Public Interests disclosures*

- 4.23 The NSW Ombudsman drew the committee's attention to the potential for an aspect of the Compliance Officer's role to overlap with existing laws concerning the protection of disclosures about wrongdoing by public officials.
- 4.24 The *Public Interest Disclosures Act 1994* provides for the protection of disclosures made by public officials about certain types of workplace wrongdoing: corrupt conduct, maladministration, serious and substantial waste, government information contraventions and local government pecuniary interest contraventions.
- 4.25 Public interest disclosures can be made by 'public officials' about 'public officials'. The term 'public official' as it applies to the Parliament refers to:

- a person employed by the Speaker of the Legislative Assembly, the President of the Legislative Council, or both<sup>105</sup>
- a person employed under the *Members of Parliament Staff Act 2013*<sup>106</sup>
- contractors engaged to provide services to the parliamentary Department/s<sup>107</sup>
- volunteers and interns who are performing public official functions.<sup>108</sup>

**4.26** A member of Parliament is a ‘public official’, but not for the purposes of a disclosure made by the member.<sup>109</sup>

**4.27** The protections afforded to persons making protected disclosures are significant. For example:

- A person who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is guilty of an offence.<sup>110</sup>
- A public official who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is liable to disciplinary action.<sup>111</sup>
- A person who makes a public interest disclosure is not subject to any liability for making the disclosure.<sup>112</sup>

**4.28** The administrative departments of the Parliament<sup>113</sup> have each adopted a Public Interests Disclosures Policy in the same terms.<sup>114</sup> The Policy provides that to be protected under the *Public Interest Disclosures Act 1994* a disclosure about a member of Parliament must be made to the ‘principal officer’ of one of the parliamentary departments.<sup>115</sup> The term ‘principal officer’ is defined in the Act in relation to the Parliament as follows:

- For the Department of the Legislative Assembly – the Clerk and the Speaker

<sup>105</sup> *Public Interest Disclosures Act 1994*, section 4A(1)(a)(iii).

<sup>106</sup> *Public Interest Disclosures Act 1994*, section 4A(1)(a1).

<sup>107</sup> *Public Interest Disclosures Act 1994*, section 4A(1)(b) and section 4(1) (definition of ‘public authority’); Department of the Legislative Council, *Public interest disclosures policy*, February 2020, pp 1, 7.

<sup>108</sup> *Public Interest Disclosures Act 1994*, section 4A(1)(iv), Department of the Legislative Council, *Public interest disclosures policy*, February 2020, pp 1, 8.

<sup>109</sup> *Public Interest Disclosures Act 1994*, section 4A(1)(a)(ii). This means that a member cannot make a public interest disclosure under the Act but can be the subject of a disclosure - Department of the Legislative Council, *Public Interest Disclosures policy*, February 2020, p 7.

<sup>110</sup> *Public Interest Disclosures Act 1994*, section 20(1).

<sup>111</sup> *Public Interest Disclosures Act 1994*, section 20(1B).

<sup>112</sup> *Public Interest Disclosures Act 1994*, section 21.

<sup>113</sup> Department of the Legislative Council, Department of the Legislative Assembly and Department of Parliamentary Services.

<sup>114</sup> Each of the parliamentary departments is a ‘public authority’ under the Act and is required to have a policy that provides for its procedures for receiving, assessing and dealing with public interest disclosures: *Public Interest Disclosures Act 1994* section 4(1), section 6D.

<sup>115</sup> Department of the Legislative Council, *Public interest disclosures policy*, February 2020, p 12. A person may also make a public interest disclosure about a member of Parliament to ICAC: Department of the Legislative Council, *Public interest disclosures policy*, February 2020, p 12.

- For the Department of the Legislative Council – the Clerk and the President
- For the Department of Parliamentary Services (DPS) – the Speaker, the President and the Chief Executive of DPS.<sup>116</sup>

**4.29** The principal officer assesses reports received by/or referred to them, determines whether reports should be treated as a public interest disclosure and decides how the report should be dealt with. The principal officer is also responsible for referring evidence of a reprisal to the Commission of Police or the ICAC in certain circumstances.<sup>117</sup>

**4.30** A “disclosure officer” receives a report of wrongdoing, carries out a preliminary assessment and forwards the report to the principal officer for full assessment.<sup>118</sup>

**4.31** The *Public Interest Disclosures Act 1994* and the Policy include measures to guard against abuses of the protected disclosures procedures. For example, a disclosure made solely or substantially with the motive of avoiding dismissal or other disciplinary action is not a public interest disclosure.<sup>119</sup> The Act and the Policy also include requirements concerning the protection of the confidentiality of disclosures.<sup>120</sup>

**4.32** In its submission to the inquiry the NSW Ombudsman noted that complaints to the Compliance Officer have the potential to cover the same sorts of conduct as are addressed in public interest disclosures and suggested that the committee may wish to consider how the Compliance Officer position would intersect with the existing disclosures regime:

PIDs [public interest disclosures] can be made by ‘public officials’ about a range of workplace wrongdoing, including corrupt conduct, maladministration, and serious and substantial waste. It is therefore possible that a complaint to a Compliance Officer for the NSW Parliament might also constitute a PID. Given this possibility the Committee may wish to consider how the proposed role of Compliance Officer would fit with existing PID arrangements, and whether existing PID policies may need to be revised if the Compliance Officer role is established.<sup>121</sup>

**4.33** The NSW Ombudsman gave the following examples of specific issues the committee may wish to consider:

- nomination of the Compliance Officer as a ‘disclosure officer’ under relevant PID policies,
- processes to ensure that the Compliance Officer properly assesses complaints to determine whether they are also PIDs, and

<sup>116</sup> *Public Interest Disclosures Act 1994*, section 4(1), ‘principal officer of a public authority’.

<sup>117</sup> Department of the Legislative Council, *Public interest disclosures policy*, February 2020, p 9.

<sup>118</sup> Department of the Legislative Council, *Public interest disclosures policy*, February 2020, p 10.

<sup>119</sup> *Public Interest Disclosures Act 1994*, section 18; Department of the Legislative Council, *Public interest disclosures policy*, February 2020, p 12.

<sup>120</sup> *Public Interest Disclosures Act 1994*, section 22; Department of the Legislative Council, *Public interest disclosures policy*, February 2020, p 16. See also Parliament of NSW, *Investigating public interest disclosures*, Guidelines, February 2020, pp 5-6, 10.

<sup>121</sup> Submission 3, Mr Paul Miller, (then) Acting NSW Ombudsman, p 1.

- in cases where a complaint is (or might be) a PID, arrangements to ensure that it is dealt with in compliance with the PID Act and expected standards of practice.<sup>122</sup>

**4.34** The NSW Ombudsman also advised that its Public Interests Disclosures unit is available to provide advice and guidance in relation to the above matters.<sup>123</sup>

#### *Committee view*

**4.35** The Committee notes that the Parliament's Public Interest Disclosures Policies currently require that reports of wrongdoing by members must be made to a 'principal officer', being a Presiding Officer or departmental head, to attract the protections of the *Protected Disclosures Act 1994*. However, with the establishment of a Compliance Officer position complaints about members' conduct will be more likely to be made to the Compliance Officer than to Presiding Officers or departments.

**4.36** In the Committee's view this evolution in the system for regulating members' conduct should be reflected in a refinement to the protected interest disclosure procedures by extending the procedures to cover disclosures made to the Compliance Officer. Such a reform would provide protection for complainants and facilitate the work of the Compliance Officer, especially for member's staff.

**4.37** The Committee supports the suggestion by the NSW Ombudsman for the Compliance Officer to be nominated as a 'disclosure officer' in the Parliament's Public Interest Disclosures policies. The effect of such an amendment would be that a report of misconduct in accordance with the *Protected Disclosures Act 1994* would attract the protections of the Act if it was made either to a 'principal officer' or to the Compliance Officer and referred to a 'principal officer'. The Compliance Officer would have the functions of a 'disclosure officer' set out in the Policy including making a preliminary assessment of the report of misconduct.

**4.38** While the ability to receive disclosures is necessary and valuable, the Compliance Officer under this suggestion would be in an inferior position to the Clerks and the Chief Executive in not being able to determine whether a matter is a PID, as they could not be designated a "principal officer". In developing a referral protocol the Compliance Officer should discuss with the Ombudsman whether this could be rectified either through minor statutory amendment or whether it can be achieved by appropriate wording within the Parliament's Public Interest Disclosures policies.

**4.39** The committee also supports the suggestions made by the NSW Ombudsman for the development of procedures to ensure that the Compliance Officer complies with relevant requirements and standards relating to public interest disclosures. The Officer could work with the NSW Ombudsman specialist unit on public disclosures to incorporate this into the investigations protocol.

---

<sup>122</sup> Submission 3, Mr Paul Miller, (then) Acting NSW Ombudsman, p 2.

<sup>123</sup> Submission 3, Mr Paul Miller (then) Acting NSW Ombudsman, p 2.

---

### Recommendation 9

That:

- (a) the Compliance Officer be nominated as a ‘disclosure officer’ under the Parliament’s public interest disclosure policies,
  - (b) processes be developed to ensure that the Compliance Officer properly assesses complaints to determine whether they are also public interest disclosures, and
  - (c) arrangements be put in place to ensure that, in cases where a complaint is or might be a public interest disclosure, it is dealt with in compliance with the *Public Interest Disclosures Act 1994* and expected standards of practice including the Parliament’s public interest disclosure policies.
- 

### *Referral to other agencies of harassment complaints*

- 4.40** Complaints relating to bullying and harassment will not come within the ambit of the ICAC, one of the reasons for establishing the Compliance Officer position under its current terms. It may be that the complexity or seriousness of a complaint leads the Compliance Officer to refer the matter for further investigation to an agency with greater resources. For a complaint where it becomes apparent that sexual harassment may have occurred, for instance, it would be necessary for the Anti-Discrimination Board to be consulted as to whether an offence under section 22 (b) of the *Anti-Discrimination Act 1977* should be investigated.
- 4.41** The Clerk of the Parliaments recommends that where clause 5(a) includes a requirement for the protocol to address referral of matters between the Compliance Officer and “other relevant bodies” could add the words “including the most appropriate body in relation to harassment matters”.<sup>124</sup>

### *Committee view*

- 4.42** The Committee supports the additional words suggested by the Clerk, to ensure the protocol developed includes specific consideration of referral on harassment matters.
- 

### Recommendation 10

That the words “including the most appropriate body in relation to bullying and harassment matters” be added after the words “other relevant bodies” in clause 5(a) to ensure the protocol to be developed includes consideration of referral to agencies able to address bullying and harassment.

---

### ICAC and the Impact of Operation Keppel

- 4.43** In his submission the Chief Commissioner of the ICAC advised that their current investigation, into the alleged conduct of the former Member for Wagga Wagga, Daryl Maguire may have an

---

<sup>124</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 8.

impact on topics that are the subject of this Privileges Committee inquiry. Their investigation, Operation Keppel, may result in recommended changes to the Members' Code of Conduct.<sup>125</sup>

- 4.44 In this regard the Committee notes it is required to review the Members' Code of Conduct once each Parliament, and this would provide an opportunity to consider any amendments the ICAC may suggest and their impact on the functions or responsibilities of the Compliance Officer.

#### **Will all aspects of investigations be confidential?**

- 4.45 The Compliance Officer resolution in its current form is based upon a system in which complaints are received confidentially, investigated and resolved quickly and in most cases rectification agreed to or the complaint dismissed. This is reflected in a number of clauses:

- clause 1 “expeditiously and confidentially deal with low level minor misconduct matters”
- clause 2(a) – “the Compliance Officer may receive and investigate complaints confidentially”
- clause 2 (b) “members or the parliamentary administration may seek confidential advice”
- clause 5 (c) – the Compliance Officer will only report to the House if the member has refused to comply with a rectification order, and provided the complainant consents to the making of the report
- clause 5 (d) – no report to the house is required where the breach is minor or inadvertent and the member has taken action to rectify the breach
- clause 7 – the records of the Compliance Officer are “not to be made public” except under certain circumstances.

- 4.46 There are safeguards in the resolution for both the complainant and the member the subject of the complaint in the confidential nature of these operations. It would be expected that most complaints will be resolved, and the only public reporting will be in anonymous statistics in the annual report provided by the Compliance Officer.

- 4.47 As will be seen in Chapter Five, there is protection given to members who are the subject of complaints that have been made public prior to investigation by the Officer, by enabling them to consent to records being made public (clause 7).

#### **How will the Compliance Officer deal with vexatious complaints?**

- 4.48 Members of parliament are particularly vulnerable to the risk of vexatious complaints, whether made for political purposes by opponents or for other reasons. In his submission to the inquiry the Chief Commissioner of the ICAC acknowledges this occurs with complaints to their agency:

In the Commission's experience, complainants sometimes publicise the fact they have made a complaint. This can have a detrimental effect on any investigation and

---

<sup>125</sup> Submission 4, The Hon Peter Hall QC, Chief Commissioner, the ICAC para 3.1 – 3.2.

reputation of persons named. This is sometimes referred to as “weaponising” the complaints process.<sup>126</sup>

- 4.49** The ICAC Chief Commissioner also quotes the concerns of the UK Parliamentary Commissioner for Standards expressed in her 2019/20 annual report that “unscrupulous” complainants use the media to publicise complaints made, when the process is meant to be confidential for the protection of all parties.<sup>127</sup>
- 4.50** Clause 5 (d) of the proposed resolution provides a mechanism by which the Compliance Officer can assess a complaint as not having sufficient evidence or insufficient evidence to substantiate an investigation, and for the member and the complainant to be advised in writing of the decision.

### *Committee view*

- 4.51** The Committee believes the current resolution considers the possibility that some complaints may be made without substance, and provides a way for these to be dealt with quickly. Trivial complaints are covered effectively by this process. However there needs to be more in depth consideration of how to deal with vexatious complaints. The protocol to be developed by the Compliance Officer when appointed should address this more directly.

---

### **Recommendation 11**

That the protocol to be developed by the Compliance Officer consider the most appropriate way to deal with vexatious complaints and how to prevent the potential for abuse of the complaints process for political purposes.

---

### **Will the Compliance Officer be able to investigate a complaint by a member of one House against another?**

- 4.52** There was support in the submission from the Parliamentary Ethics Adviser<sup>128</sup> for each House to have different processes if agreement cannot be reached during the current inquiries and subsequent consideration by the Houses. This is consistent with the approach in the UK, where the House of Lords and the House of Commons have separate schemes.
- 4.53** A difficulty will arise if a complaint is made by a member in one House against a member from another House, particularly in regard to a bullying or harassment allegation which may involve both members being required to respond to requests to co-operate during the investigation. If the resolutions regarding powers, mode of investigation and reporting differ, the issue of comity will arise. Each member will be required to comply with the resolution of their House, potentially creating inconsistencies within the investigation and complexity for the Compliance Officer.

---

<sup>126</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 7.5

<sup>127</sup> Submission 6, The Hon Peter Hall QC, Chief Commissioner, the Independent Commission Against Corruption, para 7.6

<sup>128</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 6.

- 4.54** A solution proposed by the Parliamentary Ethics Adviser is to narrow the resolution to one which describes only the appointment process and the functions of the Compliance Officer, and thereafter require further detail, some of which is in the current resolution, to be tabled later in each House as draft protocols for investigation and reporting, with those protocols the referred as the subject of further inquiry.<sup>129</sup>

*Committee view*

- 4.55** The Committee believes it is important that both Houses endorse the Compliance Officer position and the way it will operate. This is particularly the case for the process under which investigations take place. While the House of Commons and House of Lords have different Standards Commissioners and differing processes, the Committee does not believe this is desirable for the NSW Parliament. The suggestion by the Parliamentary Ethics Adviser of a pared down initial resolution, followed by a more detailed resolution tabled in each House for consideration, is one last resort if agreement cannot be reached during the current inquiry process. Alternatively as a last resort there is the option of one House going alone if the other House does not support the establishment of the position or is unduly delayed in coming to a final decision. This is undesirable – having a two tiered system where one House is held to a higher standard of accountability than its counterpart is not in the interest of either House.

---

**Recommendation 12**

That the Privileges Committees in both Houses attempt to expeditiously find agreement on a form of the resolution acceptable to the members they represent, and only as a last resort should the Legislative Council establish a Compliance Officer solely under its own procedures.

---

---

<sup>129</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p5.

## Chapter 5 Reporting and oversight

This chapter considers the Compliance Officer's ability to report on investigations and other functions, and the oversight by the Privileges Committee of the position.

### How will the Officer report on outcomes of an investigation?

- 5.1 The 2014 proposal by this Committee for the appointment of a Commissioner for Standards provided that:
- The Commissioner would report to the Privileges Committee or other oversight committee designated by the House if the Commissioner found serious misconduct by a member. The committee would review the Commissioner's findings and make a report to the House recommending any sanctions.
  - If the Commissioner found no misconduct or only a minor transgression the Commissioner would not make a report but would publish the findings and relevant evidence on his or her webpage.<sup>130</sup>
- 5.2 These proposals were informed by procedures in the UK House of Commons where the Commissioner for Standards dealt with minor or inadvertent breaches of the rules through a rectification process but reported more serious breaches to a committee which could recommended sanctions to the House.<sup>131</sup>
- 5.3 In contrast to the approach adopted by this committee, the 2014 proposal by the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics for the appointment of Ethics Commissioner provided for the Commissioner to have a discretion to either keep findings confidential or report findings to the House with recommended sanctions depending on the seriousness of the breach.<sup>132</sup> The Assembly committee noted that while the UK model provided for the commissioner to a report to a committee in British Columbia the relevant commissioner reported directly to the House.<sup>133</sup>
- 5.4 Under the current resolution for the appointment of a Compliance Officer:
- The Compliance Officer can resolve complaints involving minor or inadvertent breaches of the rules by the use of orders for reimbursement or recommendations for rectification without making any report to the House (paragraph 5(c)).

<sup>130</sup> NSW Legislative Council Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, Report 70, June 2014, Recommendation 8, pp 64-65.

<sup>131</sup> NSW Legislative Council Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, Report 70, June 2014, pp 50-51.

<sup>132</sup> NSW Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into matters arising from the ICAC report entitled "Reducing the opportunities and incentives for corruption in the State's management of coal resources"*, Report 2/55, July 2014, Recommendation 4, p vii, p 14

<sup>133</sup> NSW Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into matters arising from the ICAC report entitled "Reducing the opportunities and incentives for corruption in the State's management of coal resources"*, Report 2/55, July 2014, Recommendation 4, p vii, p 13.

- If the member does not comply with such an order or recommendation and the complainant consents to the making of a report, the Compliance Officer may recommend coercive action and report to the House (paragraph 5(b)).

5.5 In his submission to this inquiry the Clerk of the Parliaments explained that a role for the Privileges Committee in considering reports has not been further explored as it was not part of the Legislative Assembly's 2014 proposal, and insisting on reporting via the Privileges Committees would have made it very difficult to reach agreement on a joint proposal.<sup>134</sup>

5.6 However, submissions from the UK House of Commons Commissioner for Standards and the Parliamentary Ethics Adviser expressed support for a system in which investigation outcomes are reported to an intermediate body rather than directly to the House.

#### ***Reporting paths for commissioners in the UK, Scotland and the ACT***

5.7 In the United Kingdom, Scotland and the ACT a parliamentary commissioner reports the outcomes of investigations to a committee or independent panel rather than direct to the House.

5.8 In the House of Commons:

- Breaches of the Code of Conduct (other those involving bullying, harassment or sexual misconduct) are investigated by the Commissioner for Standards. If the Commissioner does not uphold a complaint or if a complaint is resolved by the rectification procedure the Commissioner reports that conclusion briefly to the committee and publishes the decision and evidence on the website.<sup>135</sup> If a breach is not suitable for rectification the Commissioner reports the facts and conclusions to the Committee on Standards which reports to the House setting out its conclusions and any recommendations for action.<sup>136</sup>
- Complaints about bullying, harassment or sexual misconduct are investigated by an independent investigator in the first instance. The investigator is overseen by and reports to the Commissioner for Standards who decides whether the complaint should be upheld.<sup>137</sup> If a sanction beyond the Commissioner's powers is contemplated the Commissioner refers the matter to the Independent Expert Panel.<sup>138</sup> The Panel determines the appropriate sanction in cases referred to it by the Commissioner, hears

---

<sup>134</sup> Submission 1, Clerk of the Parliaments, p 9.

<sup>135</sup> The Commissioner may submit a memorandum to the Committee on a complaint that is not upheld if it is of particular seriousness or raises wider issues. In such a case the committee will consider the Commissioner's conclusions and submit its own report to the House: UK House of Commons, *The Code of Conduct together with the Guide to the rules relating to the conduct of members*, 8 January 2019, p 42.

<sup>136</sup> UK House of Commons, *The Code of Conduct together with the Guide to the rules relating to the conduct of members*, 8 January 2019, p 43.

<sup>137</sup> UK House of Commons, Standing Order 150(2)(f); UK Parliament, *Using the Independent Complaints and Grievance Scheme (ICGS): guide for complainants*, p 6, <https://www.parliament.uk/globalassets/documents/conduct-in-parliament/complainant-user-guide.pdf>.

<sup>138</sup> UK House of Common, SO 150(2)(f). The Independent Expert Panel consists of eight external members appointed by the House: UK House of Common, SO 150A.

appeals against decisions of the Commissioner,<sup>139</sup> and reports to the House where it proposes a sanction that can only be determined by the House.<sup>140</sup>

- Complaints about the misuse of the scheme for parliamentary expenses are a matter for the Independent Parliamentary Standards Authority (IPSA). IPSA must refer a member to the Commissioner for Standards to decide whether to inquire into a potential breach of the Code of Conduct and associated rules if it considers the member's conduct justifies it.<sup>141</sup>

## 5.9 In the House of Lords:

- Breaches of the Code of Conduct and the associated rules, including complaints involving bullying, harassment and sexual misconduct, are investigated by the Commissioner for Standards.<sup>142</sup> In cases involving bullying, harassment or sexual misconduct the Commissioner is supported by independent investigators and may delegate to the investigator any of her investigatory functions.<sup>143</sup>
- If remedial action cannot be agreed the Commissioner reports to the Conduct Committee. If remedial action is agreed the Commissioner's reports are normally published only on the Commissioner's webpages although the Commissioner has a discretion to submit such a report to the Conduct Committee.<sup>144</sup>
- The member concerned has a right of appeal to the Conduct Committee against the Commissioner's findings and any recommended sanction. In bullying, harassment or sexual misconduct cases the complainant has a right of appeal to the Committee against the Commissioner's findings.<sup>145</sup>
- Having considered any appeal the Conduct Committee reports its conclusions to the House.<sup>146</sup>

## 5.10 In Scotland:

- Complaints about members under the Code of Conduct are investigated by the Ethical Standards Commissioner who reports findings of fact and conclusions to the Standards,

<sup>139</sup> UK House of Common, SO 150A, SO 150B.

<sup>140</sup> UK House of Common, SO 150A(5)(d).

<sup>141</sup> UK House of Commons, *The Code of Conduct together with the Guide to the rules relating to the conduct of members*, 8 January 2019, pp 12, 40.

<sup>142</sup> UK House of Lords, *Code of Conduct for Members of the House of Lords; Guide to the Code of Conduct Code of Conduct for House of Lords Members' Staff*, 10<sup>th</sup> edition, July 2020, p 27.

<sup>143</sup> UK House of Lords, *Code of Conduct for Members of the House of Lords; Guide to the Code of Conduct Code of Conduct for House of Lords Members' Staff*, 10<sup>th</sup> edition, July 2020, p 31.

<sup>144</sup> UK House of Lords, *Code of Conduct for Members of the House of Lords; Guide to the Code of Conduct Code of Conduct for House of Lords Members' Staff*, 10<sup>th</sup> edition, July 2020, p 6.

<sup>145</sup> UK House of Lords, *Code of Conduct for Members of the House of Lords; Guide to the Code of Conduct Code of Conduct for House of Lords Members' Staff*, 10<sup>th</sup> edition, July 2020, p 6.

<sup>146</sup> UK House of Lords, *Code of Conduct for Members of the House of Lords; Guide to the Code of Conduct Code of Conduct for House of Lords Members' Staff*, 10<sup>th</sup> edition, July 2020, p 6.

Procedures and Public Appointments Committee.<sup>147</sup> The committee reports to Parliament with recommendations for any sanctions against the member.<sup>148</sup>

- Complaints about misuse of expenses are referred to the Scottish Parliamentary Corporate Body (SPCB) which may report improper claims to the Standards, Procedures and Public Appointments Committee.<sup>149</sup>

**5.11** In the ACT the Commissioner for Standards investigates complaints about members. The Commissioner reports to the Standing Committee on Administration and Procedure, except if the matter involved a minor or inadvertent failure to register or declare an interest and the member has taken action to rectify the failure.<sup>150</sup> The Committee determines what action will be taken in matters reported to it and includes its recommendation in a report to the House.<sup>151</sup>

### *The views of inquiry participants*

**5.12** The UK House of Commons' Parliamentary Commissioner for Standards, Kathryn Stone OBE, submitted that the reporting procedures in the House of Commons allow for an independent element in the process and an opportunity for appeal:

I would like to highlight that the system we have is different to your proposal. There is an intermediate stage between the Commissioner and the House in the form of the Standards Committee or Independent Expert Panel. This allows for an additional independent element in the process, especially in relation to sanctioning, as well as some opportunity for appeal.<sup>152</sup>

**5.13** The Parliamentary Ethics Adviser made a range of suggestions concerning procedures for reporting on investigations by the Compliance Officer drawing on the system in the UK and his own experience. These included suggestions that:

- Investigatory reports on matters involving the Code of Conduct and breaches of the pecuniary interests should be submitted to the Privileges Committee which would report its conclusions and recommendations to the House. In support of this view Mr Evans stated that:

<sup>147</sup> Scottish Parliament, *Guidance on the Code of Conduct for members of the Scottish Parliament*, last updated 2 February 2021, Section 9: Guidance on enforcement of the rules, paragraphs 8, 34 and 35: (Under the *Scottish Parliamentary Standards Commissioner Act 2002* the Commissioner reports on the outcome of investigations 'to the Parliament': section 3(1)(b). However, 'the 'Parliament' is defined to include 'any committee of the Parliament': section 20.)

<sup>148</sup> Scottish Parliament, *Guidance on the Code of Conduct for members of the Scottish Parliament*, last updated 2 February 2021, Section 9: Guidance on enforcement of the rules, paragraphs 8 and 39: <https://www.parliament.scot/msps/105601.aspx>

<sup>149</sup> The committee also has the power to investigate for itself a matter reported to it by the Commissioner Scottish Parliament, *Code of Conduct for MSPs*, Section 9: Enforcement of the rules, paragraph 6(c) <https://www.parliament.scot/msps/105602.aspx>

<sup>150</sup> ACT Legislative Assembly, Continuing resolution 5AA, paragraphs (4) and (7).

<sup>151</sup> ACT Legislative Assembly, *Complaining about a member of the Legislative Assembly*, Update August 2019, p 1.

<sup>152</sup> Submission 2, Parliamentary Commissioner for Standards (UK) p2.

[in] my experience parliamentary law and practice requires a unique knowledge, experience and practical understanding. Members of the Privileges Committee with the expert advice of senior officials of the House, such as the Clerk and Deputy Clerk, are best placed to formulate recommendations to the House, while having regard to the nuances of parliamentary practice.<sup>153</sup>

- Bullying, harassment and sexual harassment should be investigated by an independent investigator with relevant expertise.<sup>154</sup> The investigator would be overseen by the Compliance Officer who in appropriate cases could recommend sanctions to the Privileges Committee, which could also hear appeals.<sup>155</sup> To allay concerns about cases of bullying, harassment and sexual misconduct by members being considered by members, lay members could be appointed to the Privileges Committee<sup>156</sup> as occurs in both Houses of the UK Parliament.<sup>157</sup>
- There should be a different reporting scheme for decision-making and sanctions depending on the nature of the complaint. For example, while sanctions for breaches of the Code would be directly reported to the Privileges Committee in the first instance, matters involving misuse of entitlements or bullying and harassment would be reported to the relevant Presiding Officer who would bring matters to the attention of the Privileges Committee as appropriate.<sup>158</sup>

**5.14** As indicated in Chapter Four, in his submission the Parliamentary Ethics Adviser contemplated the possibility that the two Houses may not agree on the precise terms of the proposed resolution for a Compliance Officer. In that event Mr Evans submitted that the Privileges Committee should propose a scheme to meet the needs of the Legislative Council but with a common compliance officer for both Houses.<sup>159</sup> In support of such an approach Mr Evans suggested that the resolution establishing Compliance Officer should be confined to the terms of appointment and basic functions and that matters such as the reporting scheme could be addressed in the protocol and in a specific resolution of the House.<sup>160</sup>

### *Committee comment*

**5.15** The resolution establishing the Compliance Officer provides for minor complaints to be resolved by the rectification procedure and for complaints not capable of rectification to be reported to the House with any recommendations for action. However, two of the submissions to this inquiry drew attention to the benefits of procedures in the UK Parliament where the

<sup>153</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 9

<sup>154</sup> The Parliamentary Ethics Adviser suggests the Anti-Discrimination Board as an example, the Ombudsman has also offered assistance in providing expertise – Submission 3, Mr Paul Miller, (then) Acting NSW Ombudsman, Office of the NSW Ombudsman, p 3.

<sup>155</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 8.

<sup>156</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 11

<sup>157</sup> The House of Commons Committee on Standards consists of seven members and seven lay members: House of Commons Standing Order 149(2)-(5). The House of Lords Conduct Committee consists of five members of the Lords and four lay members: <https://committees.parliament.uk/committee/402/conduct-committee/membership>.

<sup>158</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, pp 9-10.

<sup>159</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 6.

<sup>160</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, pp 5-6.

commissioner who investigates member's conduct reports to an equivalent to the Privileges Committee, which reports its conclusions and recommendations to the House.

- 5.16** The advantages of requiring the Compliance Officer to report to the Privileges Committee rather than directly to the House include:
- Allowing for appeals against the Compliance Officer's findings to be made and heard before the matter is considered by the House.
  - Leveraging the experience and expertise of the Privilege Committee in parliamentary law and practice for the formulation of recommendations to the House concerning sanctions against members or other appropriate actions in response to the outcomes of investigations.
- 5.17** The Privileges Committee involvement would provide a confidential forum to discuss any sanction recommended by the Compliance Officer against a member before reporting to the House, in a situation where the member, under clause 5 (c) is disputing the sanction.
- 5.18** The Committee believes that the suggestions made by the Parliamentary Ethics Adviser discussed above are worthy of further consideration. These include suggestions that:
- The Compliance Officer would report to the Privileges Committee in relation to breaches of the Code of Conduct and pecuniary interest regime not capable of rectification
  - Complaints of bullying, harassment and sexual misconduct would be handled by an independent investigator with suitable expertise who would report to the Compliance Officer (see chapter 2). In appropriate cases the Compliance Officer could recommend sanctions to the Privileges Committee which would also be able to hear appeals.
  - The Privileges Committee would include a number of lay members to address potential concerns about bullying, harassment and sexual misconduct by members being considered by members. This would not be relevant to other matters, such as minor entitlements matters.
- 5.19** If there is not the will to incorporate these into the current resolution establishing the Compliance Officer they could be adopted for the Legislative council only in the first instance, with a common Compliance Officer working across both Houses. The options could then be considered in any review of the resolution to be conducted following the initial period of its operation.
- 5.20** The committee notes again that this procedure involving the Privileges Committee is only expected to be used in a small minority of cases where rectification is not possible; the majority of cases would be unlikely to reach this stage.

---

### Recommendation 13

That clause 5(b) and clause 6 of the proposed resolution be amended to require:

- (a) the Compliance Officer report to the Privileges Committee in relation to breaches of the Code and disclosure requirements when the matter is not capable of rectification
  - (b) that on bullying and harassment issues, an independent investigator reports to the Compliance Officer, who then reports to the Privileges Committee when the matter is not capable of rectification.
  - (c) that the Privileges Committee then recommend to the House any actions required by the member or the House.
- 

### Can the records of the investigation be subpoenaed?

**5.21** In his submission to this inquiry the Clerk of the Parliaments advises that the records of the Compliance Officer are “records of the House” to the extent that when these records are sufficiently connected to proceedings in parliament, they would be privileged.<sup>161</sup> Where the complaint has some association with the sittings or a committee hearing, or the Register of interests, this connection could be made. For a simple matter of misuse of entitlements, however, records would be less likely to be privileged.

**5.22** The Parliamentary Ethics Adviser suggests to mitigate any doubt, the Compliance Officer should be appointed as an Officer of the House, and that the House pass a resolution in the following terms:

For the avoidance of doubt, the provisions of Article 9 of the Bill of Rights 1688, applies in relation to the proceedings of the Compliance Officer for the purposes of “proceedings in Parliament” and the test of necessity of the proper functions the House is intended to execute.”<sup>162</sup>

**5.23** If all records are privileged, as suggested by this resolution, their use as evidence in any court or tribunal could not be questioned or impugned, even if they were subpoenaed.

**5.24** In regard to potential use in industrial matters, it should be noted that under s26 of the *Members of Parliament Staff Act 2013* the employment of a staff member, or any matter, question or dispute relating to any such employment, is not an industrial matter for the purposes of the *Industrial Relations Act 1996*, so it would be difficult to conceive of a circumstance where records of a complaint made by a staff member against a member could be subpoenaed for a matter before the Industrial Court or similar.

### In what circumstances will the records of the Compliance Office be made public?

**5.25** Clause 7 requires the Compliance Officer to keep “records of advice given and the factual information upon which it is based, complaints received and investigations”. Although these

---

<sup>161</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 10.

<sup>162</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 11.

are to be regarded as “records of the House” these records are not to be published, except by a two step process – prior approval of the Compliance Officer, then by resolution of the House. The only exceptions to this are:

- When referred to other relevant authorities according to the protocol to be developed (see previous chapter), or
- Where the member requests that the records be made public.

**5.26** The Parliamentary Ethics Adviser recommends omitting this clause, suggesting it would be preferable to let the Compliance Officer propose an approach to record keeping in the protocol to be developed and taken to Privileges Committee for approval.<sup>163</sup> If this clause is retained instead, he expresses concern about the mechanism for a member requesting that records be made public:

...How is this to occur?

As Parliamentary Ethics Adviser I have previously informed the Committee that there needs to be provision in a resolution of the House for a document which a Member agrees to be made public to be able to be presented to the Clerk and deemed to be tabled and presented to the House at the next sitting. It is only in this manner that the document attracts parliamentary privilege.<sup>164</sup>

**5.27** His concern is that a member may choose to make public a record of the investigation, separate from the process of a recommendation from the Compliance Officer and resolution of the House, with doubt then as to whether the publication is protected by parliamentary privilege.

**5.28** Mr Evans suggests any doubt as to the application of parliamentary privilege to the proceedings of the Compliance Officer could be mitigated by including in the proposed resolution a reference that Article 9 of the *Bill of Rights 1688* applies to make records “proceedings in parliament”.<sup>165</sup> The Clerk of the Parliaments advises that in his view:

As records of the House, and to the extent the records of the Compliance Officer are sufficiently connected to proceedings in Parliament, they would be privileged.<sup>166</sup>

**5.29** The Chief Commissioner of the ICAC expresses concern that the current terms of reference do not go far enough in empowering the Compliance Officer to make records public, noting the UK Parliamentary Commissioner for Standards publishes details of substantiated inquiries via a public website.<sup>167</sup> The concern is that requiring a resolution of the House to publish cl 5 (b) reports (where the member refuses to comply) or other documents makes this a political process:

While the Commission agrees that evidence and working documents held by the Compliance Officer should not necessarily become public documents, there is a need for finalised investigation reports to be made public in certain circumstances. The

---

<sup>163</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 10.

<sup>164</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 10.

<sup>165</sup> Submission 7, Mr John Evans, Parliamentary Ethics Adviser, p 11.

<sup>166</sup> Submission 1, Mr David Blunt, clerk of the Parliaments, p 10.

<sup>167</sup> Submission 6, the Hon Peter Hall QC, Chief Commissioner, the ICAC, para 7.3.

function performed by the Compliance Officer relies on his or her findings having a meaningful deterrent effect and a system that promotes both transparency as well as accountability. By itself, the annual report contemplated by clause 8 of the terms of reference would not, in the Commission's view, provide sufficient transparency. In any case, it is preferable that addressing a member's failure to comply with the authorised powers of the Compliance Officer is not based on a political process.<sup>168</sup>

- 5.30** The ICAC also suggests that the Compliance Officer be given a discretion to redact the names of individuals when publishing reports.<sup>169</sup>
- 5.31** Finally the Chief Commissioner raises the issue of a potential imbalance if reports are not published. A complaint, when made, will often be publicised in the media, to the detriment of the member, the subject of the complaint. If the final report, which may find the claim is not substantiated, is not published, the damage to reputation is not addressed, and there is therefore the risk of the complaints process being "weaponised".<sup>170</sup> The Chief Commissioner recommends the investigation protocol address this issue.

#### *Committee view*

- 5.32** Although clause 7 makes reference to the records of the Compliance Officer being "records of the House" the issue raised by the Parliamentary Ethics Adviser about the risk of a member publishing without the protection of parliamentary privilege is concerning. The officer will sometimes investigate very sensitive matters. To avoid any risk to members, adding a mechanism to the clause to specify *how* a member publishes a record would be prudent.

---

#### **Recommendation 14**

That the following words be added to the end of clause 7:

"A member requesting the records be made public should present the records to the Clerk, to be tabled in the House at the next sitting."

---

- 5.33** The Committee notes the concern of the Chief Commissioner of the ICAC that currently the power to publish is in the hands of the House rather than providing some discretion to the Compliance Officer. The Committee believes the way to address this is to have the Compliance Officer report clause 5(b) cases through the Privileges Committee, which can consider whether to recommend to the House if any records of the investigation are to be made public (see above). This could include consideration of the amount of publicity given to the original complaint and the impact if the outcome of any investigation is not made public. The Privileges Committee acts in a responsible and generally non-partisan manner, and the risks of politicising the issue are much less than if the decision is made directly by the House rather than acting on a recommendation of the Committee.

---

<sup>168</sup> Submission 6, the Hon Peter Hall QC, Chief Commissioner, the ICAC, para 7.2.

<sup>169</sup> Submission 6, the Hon Peter Hall QC, Chief Commissioner, the ICAC, para 7.4.

<sup>170</sup> Submission 6, the Hon Peter Hall QC, Chief Commissioner, the ICAC, para 7.5 – 7.7.

- 5.34** The Committee further notes that clause 5 provides a number of scenarios in which no report is required, and that the establishment of the position is primarily meant to lead to quick and efficient resolution of minor breaches. The concerns about the process being “weaponised”, based no doubt on the Commission’s own experience and that of the UK, will hopefully have less potential given the more modest aims of the Compliance Officer. If it does occur then the annual meetings between the Compliance Officer and the Privileges Committee (clause 9) provide the forum to raise this issue.
- 5.35** The Committee is concerned that there may be circumstances where timely publication is required, where for instance the initial complaint received significant publicity and the subsequent investigation has cleared the member of any fault. In this case there needs to be an option for an expeditious publication process, by empowering the Privileges Committee to publish out of session if in the view of the Committee it should not wait until the House sits.

---

**Recommendation 15**

That in circumstances where a more expeditious publication is required due to a long break between sittings, the Privileges Committee be empowered to publish such records following a recommendation from the Compliance Officer.

---

***Drafting error***

- 5.36** On an unrelated and minor matter, the wording of Clause 7 contains a drafting error where it mentions “in accordance with paragraph 12 of the protocol”. There is no paragraph 12, and the protocol in clause 5 (a) is required to be prepared within three months of the Compliance Officer appointment being made, it will not be in existence when the position is established.

---

**Recommendation 16**

That the words “with paragraph 12 of the protocol” be omitted from Clause 7 of the proposed resolution and the words “the protocol to be developed in accordance with clause 5 (a)” be inserted instead.

---

**What oversight will there be over the work of the Compliance Officer?**

- 5.37** The reporting to Parliament by the Compliance Officer is similar in intent to the current reporting requirements of the Parliamentary Ethics Adviser – annual reporting to Parliament on numbers of members who have sought advice, the numbers and types of complaints received, numbers of investigations and the findings of those investigations (clause 8) and an annual meeting with the Privileges Committee of each House (clause 9). The Clerk of the Parliaments suggests this should be seen as a minimum – that the committee meet at least annually.<sup>171</sup>

---

<sup>171</sup> Submission 1, Mr David Blunt, Clerk of the Parliaments, p 10.

## Chapter 6      A revised resolution for the Compliance Officer

This chapter provides a redrafted resolution based upon the recommendations made in the earlier chapters of this report.

- 6.1      The recommendation below contains the revised resolution which the committee submits for consideration by the House, in response to the referral given to it to examine the draft resolution to establish a Compliance Officer.

---

### Recommendation 17

That the House consider adopting the following revised resolution to establish a Compliance Officer:

(1)      **Establishment of position**

That this House directs the President to join with the Speaker to make arrangements for the establishment of the position of Compliance Officer, to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all members and staff.

(2)      **Functions of position**

The Compliance Officer shall have the following functions:

- (a)      Receive and investigate complaints

The Compliance Officer may receive and investigate complaints confidentially in relation to alleged breaches of the members' code of conduct, not related to conduct in proceedings of the Legislative Council or Legislative Assembly or their committees, including:

- (i)      misuse of allowances and entitlements,
- (ii)     other less serious misconduct matters falling short of corrupt conduct,
- (iii)    allegations of bullying, harassment and other types of grievances,
- (iv)    minor breaches of the pecuniary interests disclosure scheme.

- (b)      Monitoring Code of Conduct for Members

The Compliance Officer shall monitor the operation of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 and the members' entitlements system, and provide advice about reform to the Privileges Committee as required.

(c) Educational presentations

The Compliance Officer shall assist the Privileges Committee, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the Constitution (Disclosures by Members) Regulation 1983.

(d) Informal advisory services

A member or the parliamentary administration may seek confidential advice on a matter of interpretation of the Members' Entitlements scheme, for the purposes of resolving any disagreements, or any other matter within the complaints handling functions of the position.

**(3) Amendment of the Code of Conduct for Members**

The Members' Code of Conduct is amended by

**(a)** the addition of the following paragraph:

*"Clause 10*

A Member must treat their staff and each other and all those working for Parliament in a manner compatible with a safe workplace, free from harassment, in the course of their parliamentary duties and activities with dignity, courtesy and respect, and free from any behaviour that amounts to bullying, harassment or sexual harassment"

*Commentary*

*Section 22(b) of the Anti-Discrimination Act 1977 makes it an offence for a member to sexually harass a workplace participant or another member in the workplace, or for a workplace participant to sexually harass a member."*

**(b)** the insertion into the second paragraph of clause 9 the following words:

**"A minor breach of this Code may be the subject of an investigation by the Compliance Officer"**

**(4) Term of appointment**

**(a)** Appointment by Presiding Officers

The Presiding Officers shall appoint a Compliance Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of that Parliament and until the mid-term point of the following Parliament, on such terms and conditions as may be agreed upon with the Presiding Officers, not inconsistent with this resolution. The proposed appointment must have the support of the Privileges Committee in each House. An appointment may be extended for

---

a period of up to six months so as to ensure there is no period in which there is no person holding the position.

~~(b) Dismissal~~

~~The Compliance Officer may only be dismissed by the Chief Executive Officer of the Department of Parliamentary Services with the consent of the President and Speaker.~~

**(5) Complaints investigations**

(a) Protocol

The Compliance Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Privileges Committee and tabled in the House by the President, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Compliance Officer and the Independent Commission Against Corruption and other relevant bodies (including the most appropriate agencies in relation to bullying and harassment matters), subject to relevant legislation (including section 122 of *the Independent Commission Against Corruption Act*).

(b) Investigatory report to the House

Where the Compliance Officer considers that there has been a misuse of an allowance or entitlement, the Compliance Officer may order repayment of funds misused. Where the Compliance Officer considers that a member has otherwise breached the Members' Code of Conduct, the Compliance Officer may recommend corrective action.

Subject to (c) below, the Compliance Officer will make a report to the House if, and only if, the member does not comply with the order or accept the recommendation as the case may be, and the complainant consents to the making of a report. This report will be presented to the Privileges Committee, which will consider whether to adopt the recommendations of the Compliance Officer and report to the House.

Where the complaint relates to bullying and harassment matters and has been investigated by an expert appointed for that purpose, the expert will report to the Compliance Officer and the Compliance Officer will only report to the Privileges Committee where the matter is incapable of rectification.

(c) Minor breach

Where the Compliance Officer investigates a matter and finds that a member has breached the Code or Regulations, but in his or her opinion considers the breach to have been minor or inadvertent and the member

concerned has taken such action to rectify the breach, including the making of appropriate financial reimbursement, the Compliance Officer shall advise in writing the member and the complainant of the finding and the action taken by the member. No report to a House is required in this circumstance.

(d) Declines to investigate

If the Compliance Officer receives a complaint but upon assessment declines to investigate the matter, or upon investigation finds no evidence or insufficient evidence to substantiate a breach of the Code of Conduct for Members or the Constitution (Disclosure by Members) Regulation, the Compliance Officer shall advise in writing the member and the complainant of the decision. No report to a House is required in this circumstance.

(e) Expert assistance

The Compliance Officer may engage the services of a person or persons to assist with or perform services for the Compliance Officer, including receiving complaints regarding bullying and harassment in the first instance, and in the conduct of an investigation, within budget. The Compliance Officer will be notified when a complaint has been made.

**(6) Powers of the Compliance Officer**

The Compliance Officer shall have power to call for the production of relevant documents and other records from members and officers of the Parliament.

Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the Compliance Officer's inquiries including giving a full, truthful and prompt account of the matters giving rise to a complaint.

The Compliance Officer may report any failure to comply with these provisions to the President Privileges Committee, which will recommend whether the matter requires the determination of the matter by the House.

**(7) Keeping of record**

The Compliance Officer shall be required to keep records of advice given and the factual information upon which it is based, complaints received and investigations. The records of the Compliance Officer are to be regarded as records of the House and are not to be made public without the prior approval of the Compliance Officer and resolution of the House, except for the referral of information between the Compliance Officer and other relevant authorities in accordance with paragraph 12 of the protocol to be developed in accordance with clause 5 (a), or where the member requests that the records be made public.

A member requesting the records be made public should present the records to the Clerk, to be tabled in the House at the next sitting. During an extended break in sittings the Privileges Committee is empowered to publish records of the

---

---

Compliance Officer, on the recommendation of the Officer that expeditious publication is required.

**(8) Reports to Parliament**

In addition to reports on investigations, the Compliance Officer shall be required to report to the Parliament annually on the performance of his or her functions including the number of members who sought advice, the number and types of complaints received and the number of investigations undertaken and the findings of those investigations. All reports from the Compliance Officer are to be tabled by the President on the next sitting day after receipt.

**(9) Annual meeting with relevant committees**

The Compliance Officer is to meet annually with the Privileges Committee of the House.

---



## Appendix 1 Submissions

No.	Author
1	The Clerk of the Parliaments
2	Parliamentary Commissioner for Standards (UK)
3	NSW Ombudsman
4	Public Service Association of NSW
4a	Public Service Association of NSW
5	Audit Office of New South Wales
6	NSW Independent Commission Against Corruption
7	Mr John Evans, Parliamentary Ethics Adviser
8	The Ethics Centre

## Appendix 2 Chapter 4 of the Privileges Committee 2014 report

---

PRIVILEGES COMMITTEE

Privileges Committee

**Recommendations of the  
ICAC regarding aspects of  
the *Code of Conduct for  
Members*, the interest  
disclosure regime and a  
parliamentary investigator**

Ordered to be printed 12 June 2014

---

Report 70 – June 2014 1

## Chapter 4 A Parliamentary Commissioner for Standards

This chapter examines the merits of implementing a Parliamentary Commissioner for Standards in New South Wales, drawing in particular on the model from the UK Parliament.

### Recommendation 25 of the ICAC

4.1 Recommendation 25 of the ICAC in its report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources* was as follows:

That the NSW Parliament's Legislative Council Privileges Committee considers the establishment of a parliamentary investigator position in consultation with the Legislative Assembly Privileges and Ethics Committee.

### Summary of the current arrangements for regulating the conduct of members in New South Wales

4.2 The conduct of members of the Parliament of New South Wales is regulated in a number of ways:

- Conduct in the chambers is governed by the standing orders of each House.
- As indicated in Chapter 2, both Houses have adopted an identical *Code of Conduct for Members* which deals with matters such as: disclosure of conflicts of interest; bribery; gifts; use of public resources; use of confidential information; the role of political parties; and secondary employment.
- The ICAC has jurisdiction to investigate allegations of corrupt conduct against a member, in accordance with the definition of corrupt conduct in the *Independent Commission Against Corruption Act 1988*. The role of the ICAC is considered further below.
- As indicated in Chapter 3, there is a statutory scheme for the disclosure by members of their pecuniary and other interests.
- The Parliament has appointed a Parliamentary Ethics Adviser to advise members, upon their request, on ethical issues concerning the exercise of their role as members.
- The Privileges Committees of each House have roles in relation to the review of the *Code of Conduct for Members*, educative work in relation to ethical standards, and may investigate matters referred to it by the House.

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

### The role of the ICAC

- 4.3 As indicated, the ICAC has jurisdiction to investigate allegations of corrupt conduct against a member, in accordance with the definition of corrupt conduct in the *Independent Commission Against Corruption Act 1988*.<sup>99</sup>
- 4.4 In his written submission, the Clerk of the Parliaments, Mr David Blunt, noted that the ICAC is currently the only body in New South Wales outside of Parliament which may investigate allegations or complaints that a member has breached the code of conduct:

... the ICAC has independent discretion to determine which matters it pursues through a formal (including possibly public) inquiry. Where the ICAC finds that a member has committed a “substantial breach” of the code of conduct and that a member’s conduct also falls within the other limb of the definition of corrupt conduct (section 8 of the *ICAC Act*), it may report that finding to Parliament. Whilst there are no direct legal consequences from such a finding, it may be accompanied by a recommendation that consideration be given to prosecution for an offence or disciplinary proceedings. Furthermore... a finding of corrupt conduct, even in relation to a matter less serious in nature, will have a significant impact upon a member’s reputation and in most cases precipitate the end of the member’s parliamentary career.<sup>100</sup>

### Comments by the ICAC in support of recommendation 25

- 4.5 In support of recommendation 25, the ICAC made the following comments in its report:

The conduct of members must also be open to judgment. A comprehensive, timely and independent system for dealing with complaints about the conduct of members is absent in the current system. The NSW Parliament lacks an effective mechanism to manage its own members.<sup>101</sup>

- 4.6 The ICAC also commented that:

The effectiveness of codes of conduct and statutory pecuniary interest regimes is dependent on timely and impartial enforcement mechanisms. No such enforcement mechanism exists in NSW outside of that provided by the Commission’s jurisdiction. This is problematic for allegations of minor breaches given the role of the Commission, as far as practicable, to direct its attention to serious and systemic corrupt conduct. Furthermore, the provisions of s 9 of the *ICAC Act* require a “substantial” breach of an applicable code of conduct.

The *Constitution Act 1902* provides that either House may declare a member’s seat vacant if they wilfully contravene the requirements of the Constitution (Disclosures by Members) Regulation 1983. A member’s seat has never been declared vacant under these provisions. In effect, sanction against a member is dependent on party numbers

<sup>99</sup> *Independent Commission Against Corruption Act 1988*, ss 7-9.

<sup>100</sup> Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, Attachment 1. *A Parliamentary Commissioner for Standards for New South Wales?*, July 2013, p 5.

<sup>101</sup> ICAC, *Reducing the opportunities and incentives for corruption in the State’s management of coal resources*, October 2013, p 41.

and support for a member. The findings of the 2002 Legislative Council's Privileges Committee inquiry into Edward Obeid Sr's pecuniary interest returns demonstrate the shortcomings associated with relying on parliamentary committees to investigate members.

In recent years, there has been support for the creation of an external third party to deal with complaints concerning members. The background to these proposals is well documented in a paper presented by David Blunt, Clerk of the Parliaments and Clerk of the Legislative Council to the 44th Presiding Officers and Clerks Conference in 2013. Mr Blunt's paper includes a discussion on the Parliamentary Commissioner for Standards model adopted in the UK, and how this model could work in NSW.

The establishment of a parliamentary investigator to examine minor allegations about members would provide a number of benefits. These include the provision of an impartial and timely mechanism for resolving minor complaints about the conduct of members. Public confidence in the institution of parliament might be enhanced if the standards that apply to members are enforced. The creation of a parliamentary investigator may also provide for a "graded" approach to non-compliance rather than the "all or nothing" response of the current system.

The Commission supports further consideration of this idea provided there is no change to its jurisdiction or the definition of corrupt conduct in the ICAC Act as a result of any review.

### **Limitations of the current arrangements for regulating the conduct of members in New South Wales**

4.7 As noted above, the ICAC observed in its report that there are a number of limitations to the current arrangements for regulating the conduct of members in New South Wales. The committee summarises the limitations of the current arrangements for regulating the conduct of members below:

- The ICAC is the only body outside of Parliament with jurisdiction to investigate allegations of corrupt conduct against a member, in accordance with the definition of corrupt conduct in the *Independent Commission Against Corruption Act 1988*.
- The resources of the ICAC are naturally directed towards investigations into large-scale systemic corruption, as is appropriate under the *Independent Commission Against Corruption Act 1988*. Inevitably, as a result, the ICAC cannot investigate every allegation referred to it. The Committee notes that in 2011/2012, the ICAC received 2,978 matters, commenced 73 preliminary investigations, 19 full investigations and held 10 public inquiries.
- Where the ICAC does undertake an investigation into the conduct of members and finds that there has been a substantial breach of the *Code of Conduct for Members*, there is no discretion in the finding that the ICAC may hand down: the ICAC either makes a finding of corrupt conduct or it does not.
- In the absence of alternative avenues for investigations, matters concerning members are routinely referred to the ICAC which may then undertake preliminary investigations for several months without any further announcements. Members may therefore find themselves subject to media reports of having been "referred to the ICAC" or being

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

“investigated by the ICAC”, and have that situation continue for some time, even though the complaint may be trivial, vexatious or less serious in nature.

- While the ICAC has wide investigatory powers, under section 122 of the *Independent Commission Against Corruption Act 1988*, parliamentary privilege is expressly preserved in relation to the freedom of speech and debates and proceedings in Parliament, save in one respect: Parliament has waived any privilege attaching to members’ interest returns to allow the ICAC to make use of members’ returns for the purposes of any investigation or for the purposes of any finding or recommendation. This limits the capacity of the ICAC to investigate or adjudicate on breaches of the *Code of Conduct for Members* where the conduct in question is protected by parliamentary privilege.
- While Parliament may itself investigate complaints against members through committees such as this committee, the instances of this are rare. In 2002, the Privileges Committee was asked to investigate the pecuniary interest returns of the Hon Eddie Obeid. In its report, the committee divided along party lines, prompting the Chair of the Committee to label the report ‘inadequate’ and ‘politicised’.<sup>102</sup>

4.8 The committee notes that these matters are examined in more detail in the paper provided to the committee by the Clerk of the Parliaments as part of his submission to this inquiry.<sup>103</sup>

### The UK Parliamentary Commissioner for Standards model

4.9 The two Houses of Parliament in the United Kingdom both have their own independent Parliamentary Commissioners for Standards. The House of Commons appointed a Commissioner for Standards in 1995. The House of Lords followed with the appointment of a Commissioner for Standards in 2010.<sup>104</sup> The committee summarises their operation below.

#### The House of Commons Commissioner for Standards

4.10 The role of the House of Commons Commissioner for Standards is established by standing order 150 of the House of Commons:

- (1) There shall be an Officer of this House, called the Parliamentary Commissioner for Standards, who shall be appointed by the House.
- (2) The principal duties of the Commissioner shall be—
  - (a) to maintain the Register of Members’ Financial Interests and any other registers of interest established by the House, and to make such arrangements for the compilation, maintenance and accessibility of those

<sup>102</sup> Standing Committee on Privilege and Ethics, NSW Legislative Council, Report No. 20, *Report on inquiry into the Pecuniary Interest Register*, October 2002, p xi.

<sup>103</sup> Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, Attachment 1, pp 6-9.

<sup>104</sup> For a background to the development of the Commissioner for Standards model in the UK, including the work of the Committee on Standards in Public Life, see Submission 9, Attachment 1, pp 9-10.

registers as are approved by the Committee on Standards and Privileges or an appropriate sub-committee thereof;

- (b) to provide advice confidentially to Members and other persons or bodies subject to registration on matters relating to the registration of individual interests;
- (c) to advise the Committee on Standards and Privileges, its sub-committees and individual Members on the interpretation of any code of conduct to which the House has agreed and on questions of propriety;
- (d) to monitor the operation of such code and registers, and to make recommendations thereon to the Committee on Standards and Privileges or an appropriate sub-committee thereof; and
- (e) to investigate, if he thinks fit, specific matters which have come to his attention relating to the conduct of Members and to report to the Committee on Standards and Privileges or to an appropriate sub-committee thereof, unless the provisions of paragraph (3) apply.

- (2A) In determining whether to investigate a specific matter relating to the conduct of a Member the Commissioner shall have regard to whether in his view there is sufficient evidence that the Code of Conduct or the rules relating to registration or declaration of interests may have been breached to justify taking the matter further.

- 4.11 The Commissioner is limited to a complaint handling function: receiving and dealing with complaints received. The Commissioner does not have an audit function to look proactively for errors in the registration of interests or respond to media reports about a member's conduct in the absence of a complaint.<sup>105</sup>
- 4.12 As indicated above, the Commissioner is overseen by the Committee on Standards. The role of the Committee is set out in Standing Orders 149 and 149A. The role includes overseeing the work of the Commissioner for Standards.
- 4.13 Further guidance on the procedures followed by the Commissioner for Standards in conducting an inquiry into the conduct of a member under Standing Order 150(1)(e) is set out in 'Procedural note: Parliamentary Commissioner for Standards – Procedure for Inquiries'.<sup>106</sup> The introduction to the procedural note provides the following guidance on investigations into members by the Commissioner:
  - 1. The Parliamentary Commissioner for Standards:
    - considers complaints alleging that a Member of Parliament has breached the Code of Conduct and its associated rules;
    - inquires into a self-referral from a Member, with the agreement of the Committee on Standards and Privileges and on an exceptional basis; and

<sup>105</sup> Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, Attachment 1, p 13.

<sup>106</sup> Available at [http://www.parliament.uk/documents/documents/Procedural\\_Note\\_April\\_2012.pdf](http://www.parliament.uk/documents/documents/Procedural_Note_April_2012.pdf).

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

- if the Commissioner thinks fit, investigates specific matters which have come to his or her attention relating to the conduct of a Member.
- 2. Before initiating an inquiry the Commissioner will, if the matter comes within his or her remit, consider if there is sufficient evidence to justify an inquiry into whether a particular named Member may have breached the Code of Conduct.
- 3. Once initiated, an inquiry is most likely to be concluded in one of three ways:
  - i. the Commissioner may conclude that the allegation has not been substantiated: the Commissioner will not uphold it and will report that conclusion briefly to the Committee;
  - ii. the Commissioner may decide that a breach of the rules at the less serious end of the spectrum can be resolved under Standing Order No 150 through the rectification procedure (emphasis added). If so, and the Member agrees and apologises, the Commissioner will determine the matter on that basis and report the fact briefly to the Committee;
  - iii. if the Commissioner finds that there has been a breach which is not suitable for the rectification procedure, or that the inquiry raises issues of wider importance, the Commissioner will normally report the facts and his or her conclusions to the Committee in the form of a memorandum (emphasis added). The Committee will then publish the Commissioner's memorandum on the case, alongside a report setting out their conclusions in the matter, including their recommendations on any sanctions.

**4.14** Under the procedures set out above, a minor or inadvertent breach of the rules is addressed through the rectification procedure:

The Member will apologise and, where appropriate, take action to rectify the breach, such as by making a formal point of order to apologise for failure to declare interests in a previous debate.<sup>107</sup>

**4.15** More serious matters where the Commissioner finds that the breach is not suitable for the rectification procedure are dealt with through a memorandum from the Commissioner to the Committee for Standards:

In these cases, the Commissioner submits a memorandum to the Committee: the Committee provides the Member concerned an opportunity to make a written or oral submission, and then makes a Report to the House. When the Report is published, the evidence, including the Commissioner's memorandum is made public—but until then proceedings take place in private. The Committee does its utmost to proceed quickly, but complex cases may require time. It is frequently a matter of public knowledge that the Commissioner's memorandum has been submitted to the Committee, so there can be press speculation and pressure during the period before the final report is published.<sup>108</sup>

<sup>107</sup> Submission 7, Sir Robert Rogers, Clerk of the House of Commons, House of Commons, p 7.

<sup>108</sup> Submission 7, Sir Robert Rogers, p 7.

- 4.16 On receipt of memoranda from the Commissioner, the Committee on Standards and Privileges has in the past recommended to the House of Commons:
- an apology, in the form of a letter for publication
  - a formal apology, by way of a personal oral statement to the House
  - withdrawal of a retiring member's Resettlement Grant
  - repayment of expenses incorrectly claimed
  - withdrawal of an ex-member's Palace of Westminster photo-pass
  - suspension (with loss of pay) from the service of the House for a short period, ranging from a few days to a whole month.<sup>109</sup>
- 4.17 In his written submission, the Clerk of the Parliaments, Mr David Blunt, forwarded his 2013 paper entitled 'A Parliamentary Commissioner for Standards for New South Wales?' in which he provided the following examples of the operation of the House of Commons Commissioner for Standards model:
- A complaint was received about a member's use of pre-paid envelopes and House of Commons stationary to send unsolicited and "party political" letters. The complaint was upheld as conduct contrary to relevant rules, but not at the serious end of the spectrum. The Committee for Standards agreed with the Commissioner's findings, and the member made a written apology to the House and repaid the cost of the postage.
  - Complaints were received that a member had failed to comply with pecuniary interest disclosure requirements. The Commissioner upheld the complaints and concluded they were serious matters. The member had co-operated with the inquiry and taken the first available opportunity to acknowledge the breach and apologise. The Committee for Standards agreed the matter was serious and recommended the Member apologise to the House and update the entry in the register, with the update to appear in bold, italic type with an appropriate footnote. The recommendations were implemented.
  - Two complaints were received about a number of matters in relation to one member including a breach of the rules for parliamentary allowances concerning accommodation, and the use of his office for non-parliamentary purposes. The complaints were upheld, but some mitigating factors were identified. The Committee for Standards accepted the findings and recommended a repayment of £3,000 and a written apology. The recommendations were implemented.<sup>110</sup>
  - A member self-referred a request to the Commissioners to inquire into arrangements for parliamentary funded accommodation in 2009. A serious breach of the *Code* was found. The member accepted responsibility, apologised and repaid an amount of £56,592. The Committee for Standards agreed with the Commissioner's findings and recommended the member be suspended from the House for seven sitting days and apologise to the House by way of personal statement. The House agreed to the recommended suspension and the member made his apology.

<sup>109</sup> Submission 7, Sir Robert Rogers, p 7.

<sup>110</sup> Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, Attachment 1, pp 14-15.

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

- 4.18 A feature of the Committee on Standards and Privileges is that since January 2013, the membership of the Committee has included three lay members (that is, non-elected members of the public). The Committee can only meet if a lay member is present. The Clerk of the House, Sir Robert Rogers suggested that lay members act to ensure that the Committee is operating properly:

Although lay members do not have the power to vote, they each have the power to have their own or collective opinion published with any Report agreed by the Committee. In these circumstances, the Committee proceeds by consensus, with the lay members playing a full part in its proceedings. The capacity to have an opinion published would put them in a very strong position if they ever considered that the Committee was not acting properly.<sup>111</sup>

- 4.19 The annual cost of the Office of the Parliamentary Commissioner for Standards, which produces the Registers of Financial Interests as well as investigating complaints, is less than £500,000.<sup>112</sup>
- 4.20 The committee notes that in the year beginning 1 April 2012, 117 formal complaints against members and former members were received. This was very slightly more than in the previous year.<sup>113</sup>

#### The House of Lords Commissioner for Standards

- 4.21 The role of the House of Lords Commissioner for Standards is established under the Code of Conduct for Members of the House of Lords:

##### *Enforcement of the Code of Conduct*

16. A House of Lords Commissioner for Standards is appointed to investigate alleged breaches of this Code, or of the rules governing Members' financial support or use of parliamentary facilities. Any such investigation is conducted in accordance with procedures set out in the Guide to the Code of Conduct.
17. After investigation the Commissioner reports his findings to the Sub-Committee on Lords' Conduct; the Sub-Committee reviews the Commissioner's findings and, where appropriate, recommends a disciplinary sanction to the Committee for Privileges and Conduct. The Member concerned has a right of appeal to the Committee for Privileges and Conduct against both the Commissioner's findings and any recommended sanction.
18. The Committee for Privileges and Conduct, having heard any appeal, reports its conclusions and recommendations to the House. The final decision rests with the House.
19. In investigating and adjudicating allegations of non-compliance with this Code, the Commissioner, the Sub-Committee on Lords' Conduct and the Committee

<sup>111</sup> Submission 7, Sir Robert Rogers, Clerk of the House of Commons, House of Commons, p 8.

<sup>112</sup> Submission 7, Sir Robert Rogers, p 5.

<sup>113</sup> Parliamentary Commissioner for Standards, Annual Report 2012–13, p 14.

for Privileges and Conduct shall act in accordance with the principles of natural justice and fairness.

20. Members shall co-operate, at all stages, with any investigation into their conduct by or under the authority of the House.
21. No Member shall lobby a member of the Committee for Privileges and Conduct or the Sub-Committee on Lords' Conduct in a manner calculated or intended to influence their consideration of a complaint of a breach of this Code.

- 4.22 The House of Lords Commissioner for Standards made a submission to this inquiry in which he summarised his role and the process for imposing sanctions as follows:

My role is to investigate complaints and to determine if a breach has occurred. If I find that a member has breached the Code [of Conduct] but the breach is minor and acknowledged by the member concerned, the option is open for me to agree remedial action with that member. In all other cases of breach the question of sanction is decided by the sub-committee. An appeal against both sanction and finding lies to the Committee for Privileges and Conduct, with the final decision on whether a member has breached the Code and what sanction should apply being made by the House as a whole.<sup>114</sup>

- 4.23 In general terms, the committee notes that the roles of the House of Commons and House of Lords Commissioners for Standards are similar in respect of complaints concerning the conduct of members. However, there are differences in other areas. Of note, it is accepted that the House of Lords does not have a power to expel one of its members,<sup>115</sup> unlike the House of Commons. It is also notable that the House of Lords Commissioner is not required to maintain the register of interests of members in the House of Lords, unlike the role performed by the House of Commons Commissioner.

#### **Comments on the Commissioner for Standards model in the UK Parliament**

- 4.24 The committee received submissions from the Clerk of the House of Commons, the Clerk of the Parliaments in the House of Lords, the House of Lords Commissioner for Standards and the Clerk of the Parliaments in New South Wales in which they commented on the operation of the Commissioner for Standards model in the UK Parliament.
- 4.25 In his submission, the Clerk of the House of Commons, Sir Robert Rogers, commented as follows:

The inclusion of a strong independent element in the House's disciplinary system is a strength in itself. The House of Commons system allows minor infractions of the rules to be dealt with speedily by an independent investigator. Nonetheless, the Committee on Standards and, ultimately, the House itself, retain responsibility for adjudicating on serious breaches of the Code of Conduct and for deciding on the House's own disciplinary rules.<sup>116</sup>

<sup>114</sup> Submission 2, Mr Paul Kernaghan, Commissioner for Standards, House of Lords, p 2.

<sup>115</sup> *Erskine May*, 24<sup>th</sup> edn, pp 200-201.

<sup>116</sup> Submission 7, Sir Robert Rogers, Clerk of the House of Commons, House of Commons, p 8.

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

- 4.26 The Clerk of the Parliaments in the House of Lords, Mr David Beamish, indicated in his submission that prior to the establishment of the Commissioner for Standards in the House of Lords in 2010, complaints concerning the conduct of members were considered by the Sub-Committee on Lords' Interests, as it was then called. However, it was felt that an independent Commissioner was required in order to secure public confidence in the integrity and independence of investigations.<sup>117</sup>
- 4.27 Since the post of Commissioner was created in the House of Lords, the work of the Commissioner has steadily increased from two matters in 2010-2011, to six in 2011-2012 and 10 in 2012-2013. The Clerk suggested that as the role of the Commissioner has become more widely known, so the number of complaints has increased.<sup>118</sup>
- 4.28 Commenting on the operation of the Commission, Mr Beamish observed:
- ... I think it is fair to say that, although there was some resistance to the proposal to create a Commissioner, since 2010 the post has come to be accepted by the House and, it seems, the public. There is no suggestion of returning to the previous system of solely internal investigations. Moreover, the Commissioner's findings have generally been accepted; to date no appeal against one of his findings has succeeded.<sup>119</sup>
- 4.29 This position was supported by the House of Lords Commissioner for Standards, Mr Paul Kernaghan, in his written submission:
- My role was created as a result of a series of cases involving allegations of misbehaviour by members of the House of Lords. Previously, complaints and allegations were investigated by the Clerk of the Parliaments (if they related to use of expenses, as he is Accounting Officer of the House) and/or a sub-committee of five members. It was felt that this arrangement was no longer viable and that the introduction of an independent investigator would strengthen public confidence in the system.<sup>120</sup>
- 4.30 In his written submission, the Clerk of the Parliaments in New South Wales, Mr David Blunt, forwarded his 2013 paper entitled *A Parliamentary Commissioner for Standards for New South Wales?* in which he recorded the following views on the Commissioner for Standards model from his visit to the UK Parliament in 2013.<sup>121</sup>
- 'We are better off with an independent commissioner to whom complaints can be directed and who can conduct investigations than we were without one. It is an altogether sensible approach.'<sup>2</sup>
  - 'When serious matters arise there is a real sense of relief that the Commissioner is there to deal with them.'<sup>3</sup>

<sup>117</sup> Submission 6, Mr David Beamish, Clerk of the Parliaments, House of Lords, p 1.

<sup>118</sup> Submission 6, Mr Beamish, p 2.

<sup>119</sup> Submission 6, Mr Beamish, p 2.

<sup>120</sup> Submission 2, Mr Paul Kernaghan, Commissioner for Standards, House of Lords, p 2.

<sup>121</sup> The Clerk met with the current House of Commons Parliamentary Commissioner for Standards, senior Clerks of both the House of Commons and House of Lords, and representatives of the Independent Parliamentary Standards Authority and the Committee on Standards in Public Life. The views of MPs were also gauged through a session on the standards framework at the 62nd Westminster Seminar on Parliamentary Practice and Procedure.

- ‘The Commissioner and Committee are now widely accepted – they have become part of the furniture.’
- ‘The only complaints from MPs about the Commissioner or Standards Committee these days tend to arise from a minority of those investigated who sometimes feel their own matter has taken too long to resolve or who, very occasionally these days, will disagree with the finding and seek to convince the Committee the Commissioner was wrong – not a very wise course and likely to backfire.’
- ‘There has been one instance where the Committee dissociated itself from a finding of a previous Commissioner and which caused considerable grief. However, for more than ten years now there has not been a single instance in which the Committee has been dissatisfied with an investigation or the reasoning of a Commissioner – there is complete respect for the Commissioner.’
- ‘It is better to have an independent person who can decide when to investigate matters than to have politicians making such decisions on the run in response to the ebbs and flows of media pressure about particular matters.’

### **The ACT Commissioner for Standards model**

- 4.31 On 31 October 2013, the ACT Legislative Assembly established by resolution of the House a Commissioner for Standards. The committee believes that this is the first such position established in Australia.
- 4.32 The Committee reproduces the resolution of the Legislative Assembly establishing the ACT Commissioner in Appendix 2. In summary, the resolution provides that:
- A Commissioner is to be appointed at the commencement of each parliament, or whenever the office becomes vacant for the remaining life of that parliament.
  - The Commissioner must investigate specific matters referred to the Commissioner by the Speaker in relation to complaints against members, or by the Deputy Speaker in relation to complaints against the Speaker, and is to report to the Standing Committee on Administration and Procedure.
  - Members of the public may make complaints to the Speaker about a member’s compliance with the Code of Conduct or the rules relating to the registration or declaration of interests. The Speaker in turn may refer the matter to the Commissioner for investigation and report. Similarly provisions relating to complaints about the Speaker may be sent to the Deputy Speaker.
  - The Commissioner must not make a report to the Standing Committee on Administration and Procedure if the matter was minor or the failure inadvertent, and the member has taken action to rectify the failure.
  - Before providing a report to the Standing Committee on Administration and Procedure, the Commissioner must give a copy of the report to the member who is the subject of

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

the complaint under investigation, allowing the member time to comment. The Commissioner must consider any comments provided by the member.<sup>122</sup>

- 4.33 The Honourable Dr Ken Crispin QC, a former judge of the ACT Supreme Court, was appointed as the inaugural Commissioner for Standards on 6 March 2014. No matters have yet been referred to the Commissioner for investigation and report.<sup>123</sup>

### Previous discussion of a Commissioner for Standards in New South Wales

- 4.34 The establishment of a parliamentary investigator position or similar has been proposed in the past in New South Wales.
- 4.35 The UK model of a Parliamentary Commissioner for Standards and Standards Committee was highlighted by the Legislative Council Privileges Committee as early as October 1996, although without expressing any firm view.<sup>124</sup> The model has since received renewed interest in the context of attempts to address the consequences of the ICAC's limited capacity to investigate breaches of the *Code of Conduct for Members* where matters of parliamentary privilege arise.
- 4.36 In 2002, in response to a request from the Legislative Assembly to consider issues concerning the conduct of a member of the House, the ICAC advised that it had no authority to investigate matters where parliamentary privilege applies.<sup>125</sup> Subsequently, in 2003, in a report to the Speaker of the Legislative Assembly, the ICAC raised various possible models for addressing the limitations on the ICAC's jurisdiction due to parliamentary privilege:
- The appointment of a parliamentary committee, such as the Privileges Committee, to conduct investigations of such issues. However, the ICAC acknowledged that in the past, parliamentary committees in various jurisdictions have made observations on the limited capacity of committees to conduct investigations of this type.
  - The establishment of a Parliamentary Commissioner to investigate such issues. However, the ICAC noted that in New South Wales, where the ICAC can investigate all corrupt conduct allegations apart from those to which parliamentary privilege applies, the likely need to call on a Parliamentary Commissioner would be relatively seldom.
  - An amendment to the *Independent Commission Against Corruption Act 1988* to allow the Parliament to waive parliamentary privilege for specified matters which are referred to the ICAC by resolution of the House. This was one option recommended by the ICAC.
  - The appointment of an officer of the Parliament to undertake an investigation on an as needs basis. This was the ICAC's preferred option. The ICAC suggested that such a

<sup>122</sup> Submission 10, Mr Tom Duncan, Clerk of the Legislative Assembly in the Australian Capital Territory, ACT Legislative Assembly, pp 6-7.

<sup>123</sup> Submission 10, Mr Duncan, p 7.

<sup>124</sup> Legislative Council, Standing Committee on Parliamentary Privilege and Ethics Report No. 3 *Report on Inquiry into the establishment of a Draft Code of Conduct for Members*, October 1996, pp 77-89.

<sup>125</sup> Correspondence from the ICAC Commissioner to the Speaker of the Legislative Assembly, dated 16 December 2002, reported in ICAC, *Regulation of secondary employment for Members of the NSW Legislative Assembly*, Report to the Speaker of the Legislative Assembly, September 2003, p 17.

procedure 'would provide a means for the Parliament to enforce its own privileges in such a way as to ensure public confidence in the integrity and impartiality of the outcome yet still maintain the independence and self-regulation of the House'. The ICAC also recommended the provision of certain safeguards in the appointment and duties of the investigating officer.<sup>126</sup>

- 4.37 In 2004 the Assembly's Standing Committee on Parliamentary Privilege and Ethics considered the options proposed by the ICAC. The Committee recommended that the Act not be amended but that the Assembly consider options for investigating matters coming before the ICAC which involve parliamentary privilege 'on a case by case basis'.<sup>127</sup>
- 4.38 In 2004 the Hon Peter Breen gave notice of a motion in the Legislative Council for a bill providing for the appointment and functions of a Parliamentary Commissioner for Standards. The Commissioner was to be the final authority on members' use of parliamentary resources and their obligations with respect to their entitlements and allowances. As such, the bill was to follow the model already in place in other Parliaments such as the British House of Commons. Notice of the bill was given on a number of occasions and remained on the business paper until 2007, but the bill was never introduced into the House.<sup>128</sup>
- 4.39 In 2005, Mr Bruce McClintock SC was appointed by the Government to review the *Independent Commission Against Corruption Act 1988*. The review included consideration of Mr Breen's proposed bill but did not support its terms, apparently at least in part because the bill sought to oust the ICAC's jurisdiction in relation to members entirely.<sup>129</sup> However, the final report on the review included a recommendation that consideration be given to the establishment of a parliamentary investigator or parliamentary committee to investigate:
- minor matters involving members of Parliament so as to permit ICAC to focus on serious and systemic allegations of corruption, and
  - allegations of corruption that ICAC is unable to investigate because of Parliamentary privilege as preserved by section 122 of the Act.<sup>130</sup>
- 4.40 Subsequently, amendments to the *Independent Commission Against Corruption Act 1988* were made to give effect to certain recommendations contained in Mr McClintock's report.<sup>131</sup> However, these did not include any changes to the ICAC's capacity to investigate members of Parliament or any provision for a parliamentary investigator.

<sup>126</sup> ICAC, *Regulation of secondary employment for Members of the NSW Legislative Assembly*, Report to the Speaker of the Legislative Assembly, September 2003, pp 75-80.

<sup>127</sup> Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Regulation of Secondary Employment for Members of the NSW Legislative Assembly*, September 2004, p 31.

<sup>128</sup> Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, Attachment 1, p 16.

<sup>129</sup> McClintock B, *Independent review of the Independent Commission Against Corruption Act 1988*, Final Report, January 2005, pp 85-86.

<sup>130</sup> *Ibid*, p 87.

<sup>131</sup> See the *Independent Commission Against Corruption Amendment Act 2005*.

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

- 4.41 In 2010 two parliamentary committees in New South Wales briefly commented on the Parliamentary Commissioner for Standards model and recommended further consideration of the model in the new (now current) Parliament.
- 4.42 The first committee, the Joint Select Committee on Parliamentary Procedure, was established to consider the applicability to the New South Wales Parliament of any of the reforms to parliamentary procedure introduced in the Australian Parliament under the ‘Agreement for a Better Parliament: Parliamentary Reform’ which followed the 2010 federal election. As that agreement canvassed the possible appointment of a parliamentary integrity commissioner, this issue was considered by the Joint Select Committee. The Joint Select Committee agreed that the merits of a parliamentary integrity commissioner should be considered by the Privileges Committee of each House in the new Parliament.<sup>132</sup>
- 4.43 The second committee, the Legislative Council Privileges Committee, discussed the issue in its 2010 review of the *Code of Conduct for Members*. In a submission to that review the Public Interest Advocacy Centre (PIAC) recommended the investigation of the establishment of a parliamentary standards commission:
- The role of the Privileges Committee could be supported by a Parliamentary Standards Commissioner as appointed in the UK for recording and monitoring statements of interest to parliament, conflicts of interest and ensure observance of ethical practices. A Commissioner could also take over the educative role of the committee, providing guidance and training for all Members of Parliament on matters of conduct, propriety and conflicts of interest. The Australasian Study of Parliament Group reported on the role a Commissioner could take, suggesting it could also monitor and propose modifications to any guides or codes, receive and investigate complaints and possible breaches. The Commissioner in this model would report to Parliament, and be appointed on the recommendation of an all-party Parliamentary committee.<sup>133</sup>
- 4.44 In its report on the review the Privileges Committee endorsed the recommendation of the Joint Select Committee that the merits of a parliamentary integrity commissioner be considered by the Privileges Committees of each House in the new Parliament.<sup>134</sup>

### The role of the Parliamentary Ethics Adviser in New South Wales

- 4.45 Following the adoption by both Houses of the *Code of Conduct for Members* in 1998, the Council agreed to the appointment of a Parliamentary Ethics Adviser. The position has continued to

<sup>132</sup> Joint Select Committee on Parliamentary Procedure, New South Wales Parliament, *Reforms to Parliamentary Processes and Procedure*, October 2010, pp 29-30 and 64-65.

<sup>133</sup> Privileges Committee, Legislative Council, Report No. 54, *Review of the Members’ Code of Conduct 2010*, December 2010, p 44. The reference to the Australian Study of Parliament Group (ASPG) was to a publication entitled *Be Honest, Minister! Restoring Honest Government in Australia* dated 2007 published by an ‘Accountability Working Party’ under the rubric of the ASPG

<sup>134</sup> Privileges Committee, Legislative Council, Report No. 54, *Review of the Members’ Code of Conduct 2010*, December 2010, p 45.

be reappointed from time to time since, most recently by a resolution of both Houses at the commencement of the 54th Parliament.<sup>135</sup>

- 4.46 The position is part-time, and is appointed by the President and Speaker on a renewable contract with the joint Clerks.
- 4.47 The functions of the Parliamentary Ethics Adviser include advising members, upon their request, on ethical issues concerning the exercise of their role as members, including the use of entitlements and potential conflicts of interest. In 2007, the functions of the Ethics Advisers were expanded to include the provision of advice, on request, to ministers and former ministers, on post-separation employment. The role excludes the giving of legal advice.
- 4.48 In providing advice, the Ethics Adviser is guided by the *Code of Conduct for Members*, determinations of the Parliamentary Remuneration Tribunal and resources such as past reports of the ICAC.
- 4.49 The Ethics Adviser does not have any capacity to receive complaints in relation to the conduct of members or to undertake investigations.

### Submissions to the inquiry

- 4.50 A number of submissions to the inquiry commented on recommendation 25 by the ICAC to consider the establishment of a parliamentary investigator position.
- 4.51 In his written submission, the Clerk of the Parliaments in New South Wales indicated:
- The major advantage of the UK model as outlined in my paper is the scope for complaints about less serious matters, particularly for example in respect of mistakes in the disclosure of interests or the use of entitlements, to be resolved in a timely, mature and transparent manner through mechanisms such as “rectification” or “reimbursement” and apology, instead of through the ICAC. Of course, it would also provide a mechanism for the investigation and resolution of matters in relation to which parliamentary privilege arises.<sup>136</sup>
- 4.52 Dr Simon Longstaff of the St James Ethics Centre supported the appointment of a Parliamentary Commissioner for Standards, suggesting that the role of the existing Parliamentary Ethics Adviser be extended. Based on the UK Parliamentary Commissioner for Standards model, Dr Longstaff recommended that the Commissioner’s functions include:
- Providing advice, on a confidential basis, to: individual members, the Legislative Assembly Privileges and Ethics Committee and the Legislative Council Privileges Committee about the interpretation of the *Code of Conduct for Members* and other matters relating to the conduct of Members.
  - Providing advice, on a confidential basis, to: individual members, the Legislative Assembly Privileges and Ethics Committee and the Legislative Council Privileges

<sup>135</sup> *Notes and Proceedings*, Legislative Assembly, 27 June 2007, pp 196-198; *Minutes*, Legislative Council, 28 June 2007, pp 207-209.

<sup>136</sup> Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, p 3.

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

Committee, upon their request, on ethical issues arising in their role as Members of Parliament.

- Preparing guidance and providing training for members on matters of conduct, propriety and ethics.
- Receiving and investigating complaints about members who are allegedly in breach of the *Code of Conduct for Members*. ‘Serious matters’ (that is, matters falling within a class deemed to be so by the ICAC Commissioner) would be referred by the Parliamentary Commissioner to ICAC. Other ‘less serious’ matters could be dealt with in a timely manner through ‘rectification’ and ‘reimbursement’ and apology.<sup>137</sup>

- 4.53 The Director of Public Prosecutions, Mr Lloyd Babb SC, also considered that the creation of a parliamentary investigator position has merit. However, he expressed concerns as to how any such office would intersect with the roles of ICAC, the NSW Police and the criminal justice system:

I am concerned, however, that any such office has well defined investigation powers and clear protocols as to how the proposed office intersects with the roles of ICAC, the NSW Police and the criminal justice system. The creation of a system where the remedies are limited to “rectification”, “reimbursement” and apology, risks creating a closed system where appropriate matters are not dealt with by the criminal justice system.

Private citizens who dishonestly misuse company funds, for example, face investigation by the NSW Police and possible criminal charges under fraud offences.

...

Additionally, where it is revealed that the matter could possibly involve corruption, referral to the ICAC should also be an option.

As such, I am also anxious that any Investigator have defined powers that will lead to the collection of evidence that is admissible in any possible criminal prosecution.<sup>138</sup>

- 4.54 In response to this concern, the committee notes that the House of Commons Commissioner for Standards has protocols in place with various law enforcement agencies. For example, the Commissioner last year released a revised Memorandum of Understanding with the Police called *The House of Commons Code of Conduct and the Criminal Law*, the precise terms of which are available online.<sup>139</sup> At the outset, however, the MOU provides:

- 1.1 The purpose of this protocol is to record formally an agreement between the Metropolitan Police Service (MPS), Parliamentary Commissioner for Standards (PCS) and Parliamentary Committee on Standards in respect of allegations received concerning the conduct of Members of Parliament (MP’s or Members).

...

<sup>137</sup> Submission 5, Dr Simon Longstaff AO, St James Ethics Centre, p 5.

<sup>138</sup> Submission 12, Mr Lloyd Babb SC, Director of Public Prosecutions, pp 2-3.

<sup>139</sup> The protocol is available here: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmstandards/903/903.pdf>

1.3 The protocol is intended to ensure that:

- public confidence is maintained in respect of potentially criminal conduct by Members;
- the administration of justice is not impeded by actions undertaken by the Parliamentary Commissioner or the Committee on Standards;
- the Parliamentary Commissioner's investigations and the Committee on Standards's determinations are not unnecessarily impeded or delayed;
- there is transparency about the relationship between the House's disciplinary system and the law; and
- Members whose conduct is under investigation are treated fairly.

4.55 The Committee also notes the evidence of the House of Lords Commissioner for Standards, who indicated that priority is explicitly given to criminal misconduct investigations relating to an alleged breach of the Code of Conduct, and to investigations by the relevant bodies of bribery. He also indicated that he would suspend an investigation if civil proceedings were before a court, such as an action for defamation.<sup>140</sup>

4.56 On a separate matter, the committee also notes that the House of Lords Commissioner for Standards recommended that if the Parliament of New South Wales chooses to appoint a Commissioner for Standards:

... the appointment should be conducted in accordance with your rules for other senior non-political appointments. It is important that the investigator is non-party political and seen to be so. In my case, my selection was ratified by the House of Lords as a whole; whilst I am an officer of the House, I am wholly independent and am classified as self-employed. A fixed tenure is desirable. My experience indicates that a part-time role is all that is required.<sup>141</sup>

### Committee comment

4.57 The committee supports the appointment of a Commissioner for Standards in New South Wales as an additional and alternative mechanism besides ICAC for investigating allegations of misconduct against members. In the Committee's view, the Commissioner for Standards model adopted in the UK Parliament and also in the ACT Legislative Assembly has undoubted benefits:

- It would provide a mechanism for investigation of less serious allegations of misconduct against members, given the limited capacity of the ICAC, and the focus of the ICAC on large-scale corruption.
- It would allow allegations against members to be investigated and dealt with more speedily than through the current ICAC processes.

<sup>140</sup> Submission 2, Mr Paul Kernaghan, Commissioner for Standards, House of Lords, p 1.

<sup>141</sup> Submission 2, Mr Kernaghan, p 2.

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

- It would allow more ready resolution of less serious allegations of misconduct against members, including through mechanisms such as 'rectification' and 'reimbursement'.
  - It would increase the transparency with which the Parliament deals with complaints against members, with appropriate information on investigations made public.
  - It would provide an independent mechanism for assessing possible misconduct by members, removing concerns that direct investigation by specially appointed committees would be politicised.
  - It would ensure that matters in which issues of parliamentary privilege were raised could be appropriately investigated.
- 4.58 The committee believes that the cost of a Commissioner for Standards would not be significant given the needs it would address. The Committee notes evidence that the annual cost of the House of Commons Office of the Parliamentary Commissioner for Standards is less than £500,000 for a significantly larger number of members. The cost in New South Wales would likely be significantly less. A Commissioner for Standards would likely free-up the resources of the ICAC through a reduction in referral of more minor matters to the Commission.

---

**Recommendation 8**

That the Parliament of New South Wales appoints a Commissioner for Standards.

---

- 4.59 The committee notes that there is a range of considerations in relation to the method of appointment of a Commissioner for Standards, the role of the Commissioner, the oversight of the Commissioner and related matters. The committee explores these issues and sets out below for the benefit of the House its views on the optimum Commissioner for Standards model for the Legislative Council.

**Establishment of the Commissioner for Standards**

- 4.60 The committee believes that the Commissioner for Standards should ideally be established by resolution passed by both Houses, and appointed by the Presiding Officers within three months of the commencement of each Parliament on a part-time basis, and whenever the office becomes vacant. On the first appointment of the Commissioner, the term of appointment could cover the remainder of the 55<sup>th</sup> Parliament, the 56<sup>th</sup> Parliament, and the first three months of the 57<sup>th</sup> Parliament.
- 4.61 Appointment of a Commissioner by resolution of the two Houses would in no way alter the jurisdiction of the ICAC in relation to corrupt conduct or the definition of corrupt conduct in the *Independent Commission Against Corruption Act 1988*. This point was made strongly by the ICAC in its comments supporting recommendation 25.
- 4.62 Establishment of the Commissioner by resolution of the Houses would also ensure that the operations of the Commissioner remained within the exclusive cognisance of the Houses.

There would be no scope for matters considered by the Commissioner to be appealed to outside bodies, notably the courts.

- 4.63 Establishing a Commissioner by resolution of the Houses would also enable the Commissioner to investigate matters where issues of privilege arise.
- 4.64 The committee notes that there is discretion open to both Houses in how they interact with a Commissioner for Standards. In the UK, the House of Lords and House of Commons have appointed two separate Commissioners. While the committee believes that such an outcome would be unfortunate in the smaller Parliament of New South Wales, and that a joint appointment by both Houses of the same commissioner would be preferable, this does not mean that the model of how both Houses work with the Commissioner needs to be the same. The committee presents a model below whereby the Commissioner for Standards would report to the Privileges Committee of the Legislative Council, and through that committee to the House. The same model would not necessarily need to be adopted by the Legislative Assembly.

#### The role of the Commissioner for Standards

- 4.65 The committee believes that the Commissioner should have the following roles:
- To provide confidential advice to members on the exercise of their role as members, including the use of entitlements and potential conflicts of interest. The role of the Commissioner should also include the provision of advice, on request, to ministers and former ministers, on post-separation employment. This is in effect the current role of the Ethics Adviser. The Committee discusses this issue further under a separate heading on page 67.
  - To monitor the operation of the *Code of Conduct for Members* and the Constitution (Disclosures by Members) Regulation 1983, and to make recommendations thereon to the designated oversight committee of the Legislative Council.<sup>142</sup>
  - To offer annual presentations to all parliamentary parties/caucuses, as well as independent members, in the Parliament of New South Wales, with a view to informing and educating members so that they are as well-equipped as possible to fulfil their obligations under the *Code of Conduct for Members* and the Constitution (Disclosures by Members) Regulation 1983 (as is offered by the Conflict of Interest and Ethics Commissioner to members of Canada's House of Commons).
  - To receive complaints in relation to the conduct of members, either from members or from others, including the general public. Members should also be able to self-refer matters to the Commissioner.
  - To investigate:
    - complaints alleging that a member has breached the requirements of the *Code of Conduct for Members* or the Constitution (Disclosures by Members) Regulation 1983

<sup>142</sup> This arrangement would not affect the existing functions of the Legislative Council Privileges Committee to review the *Code of Conduct for Members* under section 72C of the *Independent Commission against Corruption Act 1988*.

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

- if the Commissioner thinks fit, specific matters which have come to his or her attention relating to a possible breach of the requirements of the *Code of Conduct for Members* or the Constitution (Disclosures by Members) Regulation 1983
- matters self-referred by a member concerning a possible breach of the requirements of the *Code of Conduct for Members* or the Constitution (Disclosures by Members) Regulation 1983, on an exceptional basis.

Before initiating an investigation the Commissioner will, if the matter comes within his or her remit, consider if there is sufficient evidence to justify an inquiry into a particular member.

- To report on the outcome of investigations. The Commissioner may:
  - A) conclude that there has been no misconduct by the member, and report that finding to the oversight committee.
  - B) find a minor transgression, take remedial action in agreement with the member concerned, and report that finding to the oversight committee. Remedial action may include the member repaying incorrectly claimed allowances, correcting an incorrect interest disclosure return and apologising to the House.
  - C) find significant misconduct by a member, and report the facts and his or her conclusions to the oversight committee.

Where the Commissioner concludes that there has been no misconduct by a member or finds a minor transgression (category A or B), the Commissioner is to publish on the Commissioner's webpage his or her finding(s) and the relevant evidence on which that was based. Reports on investigations where there is a finding of significant misconduct by a member (Category C) are to be provided to the oversight committee.

- To provide an annual report at the end of each financial year to the designated oversight committee of the Legislative Council.

**4.66** Consistent with the UK model, the committee does not believe that the Commissioner should have a pro-active audit function to systematically audit the conduct of all members of the Legislative Council on a routine basis. The committee notes that under the annual determinations of the Parliamentary Remuneration Tribunal, the Auditor-General is required to audit all members' additional entitlements annually for compliance. The Parliament may also conduct internal audits.<sup>143</sup> It is possible that matters may come to the attention of the Commissioner as a result of this process.

**4.67** The committee also believes that the role of compiling the *Register of Disclosures of Members of the Legislative Council* should remain with the Clerk of the Parliaments. Either the Clerk or the Commissioner for Standards would be in a position to provide advice to members on completing their interest returns.

<sup>143</sup> For the most recent determination, see Parliamentary Review Tribunal, *Annual Report and Determination of Additional Entitlements for Members of the Parliament of New South Wales*, 4 July 2013, p 26, cited at [http://www.dpc.nsw.gov.au/data/assets/pdf\\_file/0017/154250/PRT\\_Annual\\_Report\\_and\\_Determination\\_2013.pdf](http://www.dpc.nsw.gov.au/data/assets/pdf_file/0017/154250/PRT_Annual_Report_and_Determination_2013.pdf).

### Oversight of the operations of the Commissioner for Standards

- 4.68 The committee believes that the Legislative Council should designate the Privileges Committee to oversight the operations of the Commissioner for Standards.<sup>144</sup> Alternatively, a specific committee could be established by the Legislative Council for the purpose.
- 4.69 The role of the oversight committee would be to receive from the Commissioner for Standards:
- reports and recommendations in relation to the operation of the *Code of Conduct for Members* and the Constitution (Disclosures by Members) Regulation 1983
  - reports on investigations by the Commissioner into significant misconduct by a member involving a breach of the requirements of the *Code of Conduct for Members* or the Constitution (Disclosures by Members) Regulation 1983
  - annual reports of the Commissioner at the end of each financial year.
- 4.70 The oversight committee would also receive and approve guides on the operation of the Commissioner from time to time.
- 4.71 On receipt of a report on an investigation by the Commissioner into the conduct of a member where the Commissioner finds significant misconduct by a member (Category C), the role of the oversight committee would be to review the Commissioner's findings, consider any submission from the member concerned, and then make a report to the House, including recommended sanctions as appropriate. The Commissioner's report should be published as an appendix to the report of the Committee.
- 4.72 The oversight committee should not, however, be in a position to intervene in investigations being conducted by the Commissioner.
- 4.73 The committee is open to the option of including lay persons on the oversight committee for the purposes of considering reports on an investigation by the Commissioner, as occurs under the House of Commons model. The committee believes that this option is not necessary at the current time, but could be considered in future should it prove desirable.

### The role of the House

- 4.74 Where the Commissioner for Standards makes a finding of significant misconduct against a member and reports that to the oversight committee, the oversight committee reviews the matter and makes a report and recommendations to the House. The House may then impose sanctions against the member concerned, in light of the matters raised by the Commissioner and the recommendations of the oversight committee.

<sup>144</sup> The committee notes that the Privileges Committee is the designated committee of the Legislative Council for the purposes of section 72C of the *Independent Commission Against Corruption Act 1988*. One of the functions of the committee under section 72C(1)(c) is to give advice in relation to ethical standards in response to requests for advice by the Legislative Council, but not in relation to actual or alleged conduct of any particular person. The committee does not interpret this provision as restricting the capacity of the committee to receive reports from the Commissioner on the conduct of members.

## LEGISLATIVE COUNCIL

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

- 4.75 Currently, the Houses of the Parliament of New South Wales do not have punitive powers against members. They only have self-protective powers. While these powers would be sufficient to enable the Houses to seek apology or to reprimand a member, they would likely not support suspension or expulsion of members in most circumstances, or the imposition of financial penalties such as loss of pay. Should the issue arise where the House clearly required punitive powers, the Parliament would need to consider privileges legislation setting out the powers of the Houses.

#### **Powers of the Commissioner**

- 4.76 The committee notes that issues may arise in relation to the powers of the Commissioner, especially should a member not comply with an investigation by the Commissioner.
- 4.77 The Procedural note to the operation of the Commissioner for Standards in the UK House of Commons indicates:

Under paragraph 19 of the Code of Conduct Members are required to cooperate, at all stages, with any inquiry. The Committee may also exercise its power to summon persons, papers and records, either independently or at the Commissioner's request.

- 4.78 The committee would envisage the same arrangements applying in the Council. In the event that a member did not cooperate with an investigation by the Commissioner, this would be referred by the Commissioner to the oversight committee, which could then exercise its powers to seek information at the request of the Commissioner. Failure to cooperate with the Commissioner and the committee would itself be a matter that could be addressed in the committee's recommendations to the House.

#### **Guidance on the operations of the Commissioner**

- 4.79 The committee believes that there would be merit in the Commissioner for Standards, as soon as possible following his or her appointment, preparing detailed guidance on the operation of the Commissioner, including the conduct of investigations and powers of the Commissioner. This guidance should be submitted to the designated oversight committee of the Legislative Council (and any similar mechanism for the Legislative Assembly).

#### **Protocols with law enforcement agencies**

- 4.80 The committee believes that as with arrangements in the UK, the Commissioner for Standards should develop protocols with law enforcement agencies, notably the ICAC and the Police, for the management of allegations in relation to the conduct of members.
- 4.81 A protocol with the ICAC should specify the circumstances in which the Commissioner may refer matters that prima-facie concern corrupt conduct to the ICAC where there may have been a 'substantial breach' of the *Code of Conduct for Members*. The protocol should also specify instances in which the ICAC may refer matters back to the Commissioner.

### The Parliamentary Ethics Adviser

- 4.82 As indicated previously in this chapter, the Parliamentary Ethics Adviser currently provides confidential advice to members on the exercise of their role as members, including the use of entitlements and potential conflicts of interest. The Ethics Adviser also provides advice, on request, to ministers and former ministers, on post-separation employment.
- 4.83 The committee has considered whether the role of the existing Parliamentary Ethics Adviser and that of the proposed Commissioner for Standards should be combined.
- 4.84 The concern arising from combining the roles is that members may be reticent to seek advice from the Commissioner for Standards on matters concerning the *Code of Conduct for Members* or the interest disclosure regime if they know that the Commissioner could then initiate an inquiry into their circumstances.
- 4.85 The committee, however, does not overstate this concern. It seems likely that most requests for advice by members will relate to issues concerning the *Code of Conduct for Members* or disclosure of interests with which the member is currently grappling, rather than past actions that may in hindsight be the subject of an investigation. Accordingly, in most instances, the question of an investigation will not even arise.
- 4.86 Where members do seek advice from the Commissioner on past actions, under the UK House of Commons model and the model proposed for the Legislative Council, the Commissioner may, if he or she thinks fit, investigate matters that have come to his or her attention. In those instances, the Commissioner's investigation mechanism sets up three outcomes:
- A finding of no misconduct (Category A).
  - A finding of a minor transgression (Category B). The Commissioner and the member may then agree on a rectification procedure, and although there is a report to the oversight committee, and possibly even an apology to the House, rectification remains entirely a matter for the Commissioner and the member concerned.
  - A finding of significant misconduct by a member (Category C). The Commissioner reports his or her findings to the oversight Committee which then decides what sanctions, if any, to recommend to the House.
- 4.87 In the committee's view, it would be unlikely that members would seek advice from the Commissioner if they thought that their past conduct amounted to significant misconduct (Category C). Conduct falling into this category, the committee expects, would most likely involve deliberate contravention of the *Code of Conduct for Members* or interest disclosure regime.
- 4.88 However, for all other members not in this category, who at worst think that they may have inadvertently breached the *Code* or the interest disclosure regime in the past, the matter would in all likelihood be rectified by the Commissioner and the member concerned according to Categories A and B above, with no outside involvement. Indeed, in some instances, a member may deliberately seek an investigation to sort out a matter in doubt, as the UK model, and the proposed model for the Legislative Council, provide for in exceptional circumstances.
- 4.89 The committee also believes that there would be downsides to keeping separate the positions of Ethics Adviser and Commissioner for Standards. Notably, the committee feels that not

LEGISLATIVE COUNCIL

---

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

providing the Commissioner for Standards with an advice function would mean that the Commissioner would not become familiar with the spectrum of issues on which members routinely seek advice, and would be in a poorer position to make judgements on difficult issues when they arise. The Commissioner also would not be in as good a position to provide advice to the oversight committee of the Council on the operation of and possible changes to the *Code of Conduct for Members* and the interest disclosure regime.

- 4.90** The committee also notes that the UK model seemingly successfully combines the advice and investigations role into one office.
- 4.91** Accordingly, the committee concludes that while there are valid arguments both ways, on balance the roles of the existing Parliamentary Ethics Adviser and the proposed Commissioner for Standards should be combined.

## Appendix 3 Guiding Principles: A reporting process for NSW Parliament MoPS staff (extract from PSA's supplementary submission)

### Attachment:

#### Guiding principles: A reporting process for NSW Parliament MoPS staff

1. Sexual harassment, assault, gendered violence, third party violence, and bullying in a workplace are serious work, health and safety hazards.
2. The Parliament, including parliamentarians, must seek to protect the health and safety of Members of Parliament Staff (MoPS).
3. The Parliament must acknowledge the unique asymmetrical power structures that exist in this place and must actively take measures to ensure that these do not provide opportunity or cover for sexual misconduct, bullying and assault.
4. The Parliament must effectively and appropriately respond to all reports of sexual misconduct, bullying and assault.
5. Avenues for reporting must be clear and easily accessible.
6. Sexual misconduct, bullying and assault can be reported at any time. This includes the reporting of historical incidents.
7. Persons disclosing sexual misconduct, bullying and assault must be able to decide what they report and who has access to information identifying them as a person who has experienced sexual misconduct, bullying and assault.
8. There must be an independent process to respond to reports, it must be separate from the Presiding Officers and from party leaderships.
9. Prevention and response policies must only be developed and implemented following in-depth consultation with staff, their representatives, and experts in this space.

## Appendix 4 Minutes

### Draft Minutes no. 14

Wednesday 9 December 2020

Privileges Committee

Room 814/815, Parliament House, Sydney, 12.30 pm

#### 1. Members present

Mr Primrose (*Chair*)

Mr Donnelly

Mr Khan

Mrs Maclaren-Jones

Mr Mason-Cox

Mrs Ward.

In attendance: Steven Reynolds, Jenelle Moore and Noora Hijazi.

#### 2. Apologies

Ms Faehrmann

Revd Mr Nile.

#### 3. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 13 be confirmed.

#### 4. Inquiry into the proposal for a Compliance Officer for the NSW Parliament

##### 4.1 Terms of reference

The committee noted the following terms of reference adopted by the House on 17 November 2020. The committee additionally noted that a similar terms of reference has been sent to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.

- (1) The Privileges Committee review the following proposed resolution for the establishment of a Parliamentary Compliance Officer, as brought forward by the President, in the same terms as the proposal brought forward by the Speaker in the Legislative Assembly:

##### **Proposed resolution to establish a position of Compliance Officer**

##### **(1) Establishment of position**

That this House directs the President to join with the Speaker to make arrangements for the establishment of the position of Compliance Officer, to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all members and staff.

##### **(2) Functions of position**

The Compliance Officer shall have the following functions:

- (a) Receive and investigate complaints

The Compliance Officer may receive and investigate complaints confidentially in relation to alleged breaches of the members' code of conduct, not related to conduct in proceedings of the Legislative Council or Legislative Assembly or their committees, including:

- (i) misuse of allowances and entitlements,
- (ii) other less serious misconduct matters falling short of corrupt conduct,
- (iii) allegations of bullying, harassment and other types of grievances,
- (iv) minor breaches of the pecuniary interests disclosure scheme.

- (b) Monitoring Code of Conduct for Members

The Compliance Officer shall monitor the operation of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 and the members' entitlements system, and provide advice about reform to the Privileges Committee as required.

- (c) Educational presentations

The Compliance Officer shall assist the Privileges Committee, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the Constitution (Disclosures by Members) Regulation 1983.

- (d) Informal advisory services

A member or the parliamentary administration may seek confidential advice on a matter of interpretation of the Members' Entitlements scheme, for the purposes of resolving any disagreements.

### (3) **Amendment of the Code of Conduct for Members**

The Members' Code of Conduct is amended by the addition of the following paragraph:

*"Clause 10*

Members must treat their staff and each other and all those working for Parliament in a manner compatible with a safe workplace, free from harassment.

*Commentary*

*Section 22(b) of the Anti-Discrimination Act 1977 makes it an offence for a member to sexually harass a workplace participant or another member in the workplace, or for a workplace participant to sexually harass a member."*

### (4) **Term of appointment**

- (a) Appointment by Presiding Officers

The Presiding Officers shall appoint a Compliance Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of that Parliament and until the mid-term point of the following Parliament. The proposed appointment must have the support of the Privileges Committee in each House. An appointment may be extended for a period of up to six months so as to ensure there is no period in which there is no person holding the position.

(b) Dismissal

The Compliance Officer may only be dismissed by the Chief Executive Officer of the Department of Parliamentary Services with the consent of the President and Speaker.

(5) **Complaints investigations**

(a) Protocol

The Compliance Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Privileges Committee and tabled in the House by the President, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Compliance Officer and the Independent Commission Against Corruption and other relevant bodies, subject to relevant legislation (including section 122 of the Independent Commission Against Corruption Act).

(b) Investigatory report to the House

Where the Compliance Officer considers that there has been a misuse of an allowance or entitlement, the Compliance Officer may order repayment of funds misused. Where the Compliance Officer considers that a member has otherwise breached the Members' Code of Conduct, the Compliance Officer may recommend corrective action.

Subject to (c) below, the Compliance Officer will make a report to the House if, and only if, the member does not comply with the order or accept the recommendation as the case may be, and the complainant consents to the making of a report.

(c) Minor breach

Where the Compliance Officer investigates a matter and finds that a member has breached the Code or Regulations, but in his or her opinion considers the breach to have been minor or inadvertent and the member concerned has taken such action to rectify the breach, including the making of appropriate financial reimbursement, the Compliance Officer shall advise in writing the member and the complainant of the finding and the action taken by the member. No report to a House is required in this circumstance.

(d) Declines to investigate

If the Compliance Officer receives a complaint but upon assessment declines to investigate the matter, or upon investigation finds no evidence or insufficient evidence to substantiate a breach of the Code of Conduct for Members or the Constitution (Disclosure by Members) Regulation, the Compliance Officer shall advise in writing the member and the complainant of the decision. No report to a House is required in this circumstance.

(e) Expert assistance

The Compliance Officer may engage the services of persons to assist with or perform services for the Compliance Officer, including in the conduct of an investigation, within budget.

**(6) Powers of the Compliance Officer**

The Compliance Officer shall have power to call for the production of relevant documents and other records from members and officers of the Parliament.

Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the Compliance Officer's inquiries including giving a full, truthful and prompt account of the matters giving rise to a complaint.

The Compliance Officer may report any failure to comply with these provisions to the President, for determination of the matter by the House.

**(7) Keeping of record**

The Compliance Officer shall be required to keep records of advice given and the factual information upon which it is based, complaints received and investigations. The records of the Compliance Officer are to be regarded as records of the House and are not to be made public without the prior approval of the Compliance Officer and resolution of the House, except for the referral of information between the Compliance Officer and other relevant authorities in accordance with paragraph 12 of the protocol or where the member requests that the records be made public.

**(8) Reports to Parliament**

In addition to reports on investigations, the Compliance Officer shall be required to report to the Parliament annually on the performance of his or her functions including the number of members who sought advice, the number and types of complaints received and the number of investigations undertaken and the findings of those investigations. All reports from the Compliance Officer are to be tabled by the President on the next sitting day after receipt.

**(9) Annual meeting with relevant committees**

The Compliance Officer is to meet annually with the Privileges Committee of the House.

The committee noted Chapter 4 of the Privileges Committee report *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator* June 2014, which recommended the appointment of what is now proposed to be a parliamentary compliance officer.

**4.2 Submissions**

Resolved on the motion of Mrs Maclaren-Jones:

1. That the committee invite joint submissions with the Legislative Assembly Privileges Committee from the following:
  - Independent Commission Against Corruption
  - Members of the Legislative Council
  - Clerk of the Parliaments (LC committee) Clerk of the Legislative Assembly (LA Committee)
  - Ethics Adviser
  - Auditor-General
  - Ombudsman
  - Standards Commissioner UK
  - ACT Legislative Assembly Standards Commissioner
  - Parliament of Victoria

- PSA, Media Entertainment and Arts Alliance (MEAA) and United Services Union.
2. That members nominate any additional stakeholders within 48 hours of this meeting.

The committee noted that submissions would also be received from other individuals consistent with general committee practice. The committee noted that the resolution establishing the Privileges Committee does not allow for the committee to deal with individual grievances.

#### **4.3 Timeline**

Resolved on the motion of Mrs Maclaren-Jones: That the committee adopt the following inquiry timeline:

- Submissions close: 3 February 2021
- Half day hearing: 10 February 2021
- Report deliberative: Sitting week of 16-18 March 2021
- Report tabled: Week of 23-25 March 2021.

### **5. Inquiry into the execution of search warrants by the Australian Federal Police No. 3**

#### **5.1 Terms of reference**

The committee noted the following terms of reference adopted by the House on 19 November 2020:

- (1) That the Privileges Committee inquire into and report on the following matters arising from report nos. 80 and 81 of the committee relating to the execution of search warrants by the Australian Federal Police:
- (a) the rights available to a staffer to make a claim of privilege over documents,
  - (b) the rights available to a member to make a claim of privilege over documents held by their staffer, regardless of any claims of privilege made by the staffer,
  - (c) the privileged status of translations of parliamentary proceedings, and the implications for members if such translations are not protected by parliamentary privilege
  - (d) the merits of adoption of a formal memorandum of understanding between the Parliament of New South Wales and the Australian Federal Police (AFP),
  - (e) the application of the current NSW Parliament Memorandum of Understanding with the ICAC to searches of members' homes or other locations outside of the parliamentary precincts, and to other statutory provisions for the compulsory production of documents and electronic records to the ICAC,
  - (f) remote searches and surveillance of members and staff by investigative agencies in circumstances where the parliament has not been made aware a search has been undertaken, including the experience of other parliamentary jurisdictions,
  - (g) the alleged seizure of material from Mr John Zhang by the Australian Border Force on 28 January 2020,
  - (h) any future claim of parliamentary privilege made by the parties the subject of the search warrants by the AFP and arising from the current or a related investigation, and
  - (i) any other related matter.

- (2) That, for the purposes of this inquiry, the committee have access to correspondence and submissions received during the committee's first and second inquiries into the execution of search warrants by the Australian Federal Police.

## 5.2 Submissions

### Terms of reference (a) – (d):

Resolved on the motion of Mr Donnelly:

1. That submissions be invited from:
  - Members of the Legislative Council
  - Clerks of Australian, NZ and UK Parliaments
  - Relevant legal academics (Twomey, Lindell, Williams)
  - Law Society of New South Wales
  - NSW Bar Association
  - The AFP ( only in relation to (d))
  - PSA, Media Entertainment and Arts Alliance (MEAA) and United Services Union.
2. That committee members nominate any additional stakeholders within 48 hours.

### Terms of reference (e)

1. That submissions be invited from:
  - Members of the Legislative Council
  - The ICAC
  - Ethics Adviser
  - Clerk of the Parliaments.
2. That committee members nominate any additional stakeholders within 48 hours.

### Terms of reference (f)

Invite submissions once committee has reported on (a) – (d).

### Terms of reference (g)

That to pursue terms of reference (g), the Chair write to the President requesting him to write to the Commissioner of the Australian Border Force seeking details of how parliamentary privilege issues were considered during the alleged seizure of material and detention of Mr John Zhang on 28 January 2020.

## 5.3 Timeline

Resolved on the motion of Mr Donnelly: That submissions be given a deadline of 12 March 2020.

## 6. Adjournment

The committee adjourned at 12.49 pm *sine die*.

Steven Reynolds  
Committee Clerk

**Draft Minutes no. 15**

Thursday 18 February 2021

Privileges Committee

Room 1136, Parliament House, Sydney, 1.37 pm

**1. Members present**

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*)

Mr Donnelly

Ms Faehrmann

Mr Khan

Mrs Maclaren-Jones

Mrs Ward.

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay and Noora Hijazi.

**2. Apologies**

Mr Mason-Cox.

**3. Draft minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes no. 14 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received:***

- 31 December 2020 – Email from Professor Geoffrey Lindell, Emeritus Professor of Law, University of Adelaide to Privileges Committee, declining the invitation to make a submission to the inquiry into the proposal for a Compliance Officer for the NSW Parliament.
- 23 December 2020 – Letter from Office of the Commissioner of the Australian Border Force to the President of the Legislative Council, confirming receipt of correspondence from the President dated 18 December 2020.
- 18 December 2020 – Letter from Mr Stephen Stanton to the Chair, advising on behalf of the Honourable Shaoquett Moselmane MLC that a search warrant was executed on the McKell Room, Parliament House on Tuesday 15 December 2020.
- 17 December 2020 – Letter from Mr Dennis Miralis to the Clerk of the Parliaments providing documents on behalf of Mr John Zhang.
- 8 February 2021 – Letter from the President to the Chair, forwarding a request for a citizen's right of reply from Ms Kathryn Jurd, General Counsel, RSPCA.

***Sent:***

- 14 December 2020 – Letter from the Chair to the President of the Legislative Council, requesting that the President write to the Commissioner of the Australian Border Force to seek clarification of a number of issues.
- 18 December 2020 – Letter from the President of the Legislative Council to the Commissioner of the Australian Border Force, seeking clarification of a number of issues.

**5. Inquiry into the proposal for a Compliance Officer for the NSW Parliament**

**5.1 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1 to 7.

## 5.2 Inquiry timeline

Resolved, on the motion of Revd Mr Nile:

- (a) That the Chair prepare a draft report with recommendations presented as options, based upon the matters raised in submissions to the inquiry.
- (b) That following consideration of the Chair's draft report the committee consider whether it will be necessary to gather additional evidence via a hearing process to finalise recommendations.

## 6. Inquiry into the execution of search warrants by the Australian Federal Police No. 3

### 6.1 Execution of search warrant on 15 December 2020

The committee clerk briefed the committee on the execution of a search warrant on the McKell Room in NSW Parliament on 15 December 2020.

## 7. Request for a citizen's right of reply

The committee considered a request for a citizen's right of reply forwarded by the President from the RSPCA.

Resolved, on the motion of Ms Faehrmann:

- (a) That the Chair prepare and submit a draft report on the request for a citizen's right of reply by Ms Kathryn Jurd, General Counsel, RSPCA, recommending that a response by the RSPCA in a form of words agreed to by the RSPCA and the Committee be incorporated in Hansard.
- (b) That the report be adopted.
- (c) That the report be signed by the Chair and presented to the House.
- (d) That the Clerk advise the RSPCA and Mr Pearson of the proposed tabling of the report.

## 8. New app-based ethics resources

The committee considered electronic content developed by EdApp for the purposes of an e-learning resource for members on the new Members' Code of Conduct.

The committee endorsed the content, and undertook to provide any additional comments to the clerk to the committee as a matter of priority.

## 9. Adjournment

The committee adjourned at 2.00 pm *sine die*.

Steven Reynolds

**Committee Clerk**

### Draft Minutes no. 16

Thursday 1 April 2021

Privileges Committee

Room 1136, Parliament House, Sydney, 11.00 am and *via WebEx*

## 1. Members present

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*)

Mr Donnelly

Ms Faehrmann

Mr Khan

Mrs Maclaren-Jones

Mrs Ward.

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay and Noora Hijazi.

**2. Apologies**

Mr Mason-Cox.

**3. Draft minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes no. 15 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received:***

- 10 March 2021 – Email from Kathryn Jurd, General Counsel, RSPCA, to the Privileges Committee secretariat, consenting to the proposed amendments made by the committee to the reply

***Sent:***

- 9 March 2021 – Email from the Privileges Committee secretariat, to Kathryn Jurd, General Counsel, RSPCA, attaching a copy of the RSPCA's reply with proposed edits by the committee for approval.

**5. Inquiry into the proposal for a Compliance Officer for the NSW Parliament**

**5.1 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 4a and 8.

**5.2 Consideration of Chair's draft report**

The Chair submitted his draft report entitled *Proposal for a Compliance Officer for NSW Parliament*, which having been previously circulated, was taken as read.

The committee deliberated.

The committee deferred further consideration of the Chair's draft report until a future meeting.

**6. Adjournment**

The committee adjourned at 12.08 pm *sine die*.

Steven Reynolds

**Committee Clerk**

**Draft Minutes no. 17**

Thursday 6 May 2021

Privileges Committee

Room 1136, Parliament House, Sydney, 1.30 pm

**1. Members present**

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*)

Mr Donnelly

Ms Faehrmann

Mr Khan

Mrs Maclaren-Jones

Mrs Ward.

In attendance: Steven Reynolds, Jenelle Moore and Laura Ismay.

**2. Apologies**

Ms Faehrmann

**3. Draft minutes**

Resolved, on the motion of Reverend Nile: That draft minutes no. 16 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received:***

- 26 April 2021 – Letter from Michael Outram APM, Commissioner, Australian Border Force, to the Clerk of the Parliaments, confirming that the Commonwealth is making arrangements to assist the Privileges Committee in its third inquiry into the execution of search warrants by the Australian Federal Police.

The committee noted that it was open to assistance from the Commonwealth as part of its third inquiry into the execution of search warrants by the Australian Federal Police.

**5. Inquiry into the execution of search warrants by the Australian Federal Police No. 3**

**5.1 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 2 to 9.

**5.2 Partially confidential submissions – as identified by the secretariat**

Resolved, on the motion of Mr Khan: That the committee authorise the publication of submission no. 1 with the exception of other identifying information, which is to remain confidential, as per the recommendation of the secretariat.

**6. Inquiry into the proposal for a Compliance Officer for the NSW Parliament**

**6.1 Further consideration of Chair's draft report**

The Chair submitted his draft report entitled *Proposal for a Compliance Officer for NSW Parliament* and draft foreword, which having been previously circulated, was taken as read.

Resolved, on the motion of Reverend Mr Nile: That paragraph 2.8 be amended by inserting after the final dot point:

- 'Review of policies and procedures for Ministerial offices – bullying, harassment, and sexual misconduct, by the Hon Pru Goward, 19 April 2020'

Resolved, on the motion of Mr Donnelly: That paragraph 4.9 be amended by omitting 'This is unlikely to change'.

Resolved, on the motion of Mrs Ward: That:

The draft report as amended be the report of the committee and that the committee present the report to the House;

The submissions and correspondence relating to the inquiry be tabled in the House with the report;

Upon tabling, all unpublished submissions and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;

The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee.

**6.2 Report tabling**

The Chair advised the committee that the report would be tabled on Tuesday, 11 May 2021.

**6.3 Media release**

The Chair advised the committee that a media release would be issued on tabling of the report.

**7. Adjournment**

The committee adjourned at 2.12 pm *sine die*.

Steven Reynolds  
**Committee Clerk**

